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No. ———

In The

Supreme Court of the United States

October Term, 1985

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RALPH KEMP, WARDEN,
Petitioner,

v.

WAYNE CARL COLEMAN,
CARL J. ISAACS, AND
GEORGE ELDER DUNGEE,
Respondents.

———o———

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

———o———

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QUESTIONS PRESENTED

1.

Is the presumed prejudice standard of *Rideau v. Louisiana*, 373 U.S. 726 (1963) still valid in light of the presumption of correctness set forth in 28 U.S.C. § 2254(d) and the special deference due state court findings of juror impartiality?

2.

Assuming the continued viability of the presumed prejudice principle, what constitutes the "totality of the circumstances" to be reviewed in a presumed prejudice analysis?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Ralph Kemp, respectfully prays that the writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit entered in the cases involving Respondents on December 9, 1985 and January 31, 1986.

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Eleventh Circuit involving these Respondents are reported in *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985); and *Isaacs v. Kemp*, 778 F.2d 1482 (11th Cir. 1985). (*See* Appendices, Vol. I, Document No. 5 and Vol. II, Docu-

ment No. 5). The decisions of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's petition for rehearing and suggestion for rehearing *en banc* were entered on January 31, 1986. (*See* Appendices, Vols. I, Document No. 6 and Vol. II, Document No. 5). The opinions of the district court denying federal habeas corpus relief to the Respondents on remand were entered on March 18, 1985. (*See* Appendices, Vol. I, Document No. 4 and Vol. II, Document No. 4).

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JURISDICTIONAL STATEMENT

The opinions of the United States Court of Appeals for the Eleventh Circuit involving these Respondents were entered on December 9, 1985 and January 31, 1986.

This petition for a writ of certiorari has been timely filed within the allowable ninety days. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Section I, Fourteenth Amendment:

> Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

(i) Course of the Proceedings.

Respondents Wayne Carl Coleman, Carl J. Isaacs and George Elder Dungee were originally indicted on September 4, 1973 by the Seminole County, Georgia, Grand Jury on six counts of murder. All three of the Respondents, along with co-indictee, Billy Isaacs, were accused of the malice murder of six members of the Alday family: Ned Alday, Jerry Nelson Alday, Jimmy Cecil Alday, Aubrey Alday, Jester Addis Alday and Mary Campbell Alday.

Respondents filed a joint motion for a change of venue which was overruled by the trial court on October 9, 1973. Each of the Respondents was tried separately from his co-defendants and following their individual jury trials, they were each convicted on all six counts of murder on January 17, January 3 and January 9, 1974, respectively. As to each of the Respondents the jury recommended death sentences, finding statutory aggravating circumstances on each of the six counts of murder. These death sentences were imposed by the trial court.

(ii) Direct Appeals.

The Supreme Court of Georgia affirmed Respondent Coleman's convictions and sentences and, thereafter, his petition for a writ of certiorari was denied by this Court. *Coleman v. State,* 237 Ga. 84, 226 S.E.2d 91 (1976), *cert. denied,* 431 U.S. 909 (1977), *rhng. denied,* 431 U.S. 961 (1977).

Respondent Isaacs' convictions and sentences were affirmed by the Supreme Court of Georgia in *Isaacs v. State,* 237 Ga. 105, 226 S.E.2d 922 (1976). Respondent

Isaacs' petition for a writ of certiorari was denied by this Court in *Isaacs v. Georgia,* 429 U.S. 986 (1976).

Respondent Dungee pursued a separate direct appeal to the Supreme Court of Georgia, which court affirmed Respondent's convictions and sentences in *Dungee v. State,* 237 Ga. 218, 227 S.E.2d 746 (1976). Respondent Dungee filed a separate petition for a writ of certiorari in this Court which was denied in *Dungee v. Georgia,* 429 U.S. 986 (1976).

(iii) Collateral Proceedings Involving Wayne Carl Coleman

Respondent Coleman filed a state habeas corpus petition in the Superior Court of Tattnall County, Georgia and evidentiary hearings were conducted in that court on July 27, 1979 and on January 25, 1980. The state habeas corpus court entered an order on June 14, 1980 denying Respondent Coleman's petition for state habeas corpus relief. An application for a certificate of probable cause to appeal filed by Respondent Coleman in the Supreme Court of Georgia was denied on October 31, 1980. Respondent Coleman's second petition for a writ of certiorari filed in this Court was denied in *Coleman v. Balkcom,* 451 U.S. 949, *rhng. denied,* 452 U.S. 955 (1981).

On July 8, 1981, Respondent Coleman filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, Thomasville Division. (R. 11-44). Following the submission of the petition and briefs by both parties, the district court denied federal habeas corpus relief in an order dated March 11, 1982 and entered judgment for the Petitioner. Respond-

ent Coleman's motion to reopen judgment was denied on April 26, 1982. Respondent Coleman filed an application for a certificate of probable cause to appeal and a notice of appeal. (R. 340-341; 348). The certificate of probable cause to appeal was granted by the district judge on June 29, 1982. (R. 350).

Briefs were filed on behalf of all parties in the United States Court of Appeals for the Eleventh Circuit and oral argument was conducted. On June 10, 1983, the Eleventh Circuit entered an order remanding this action to the district court for an evidentiary hearing on the issue of whether a change of venue should have been granted based on alleged prejudicial pre-trial publicity and permitting the presentation of evidence on the issues of whether Respondent Coleman was denied effective assistance of counsel and whether the participation of the special prosecutor in Respondent's trial deprived Respondent of his constitutional rights.

Following the remand to the district court, extensive discovery was undertaken in order to comply with the Eleventh Circuit's remand order and evidentiary hearings were conducted on August 7, 1984 and on November 5, 6, 7, and 8, 1984. (*See* Supplemental Record on Appeal). Counsel for Petitioner and Respondent Coleman filed proposed findings of fact and conclusions of law. On March 18, 1985, the district court entered its "Findings of Fact and Conclusions of Law Pursuant to Remand." (S.R. 60-90).

(iv) Collateral Proceedings Involving Carl J. Isaacs

Following an evidentiary hearing, state habeas corpus relief was denied to Respondent Isaacs on August 31, 1977 in a consolidated action involving co-defendant George Dungee. The Supreme Court of Georgia affirmed the judgment of the state habeas corpus court denying relief to Respondents Isaacs and George Dungee in *Dungee et al. v. Hopper,* 241 Ga. 236, 244 S.E.2d 849 (1978). A joint petition for a writ of certiorari filed in this Court was denied on November 2, 1978.

The district court denied Respondent Isaacs federal habeas corpus relief on October 22, 1981. Following the filing of briefs and after oral argument in the Eleventh Circuit, the case was remanded to the district court on a limited remand to consider any additional evidence on the issue of alleged prejudicial pretrial publicity, in an order dated June 21, 1983. On March 18, 1985, the district court entered its "Findings of Fact and Conclusions of Law Pursuant to Remand," denying Respondent Isaacs federal habeas corpus relief.

(v) Collateral Proceedings Involving George Elder Dungee

Respondent Dungee was denied state habeas corpus relief by order of the Superior Court of Tattnall County, Georgia, on August 31, 1977, Respondent Dungee having filed a consolidated state habeas corpus action with co-

defendant Carl J. Isaacs. Respondents Dungee and Isaacs filed a consolidated appeal to the Supreme Court of Georgia, which court affirmed the judgment of the state habeas corpus court denying relief to Respondent Dungee in *Dungee et al. v. Hopper,* 241 Ga. 236, 244 S.E.2d 849 (1978). A joint petition for a writ of certiorari was filed in this Court and was denied on November 2, 1978.

Respondent Dungee was denied federal habeas corpus relief by the United States District Court for the Middle District of Georgia, Thomasville Division in an order dated October 22, 1981. Following the filing of briefs and the conducting of oral argument in the Eleventh Circuit Court of Appeals, this action was remanded to the district court on a limited remand to consider any additional evidence on the issue of alleged prejudicial pre-trial publicity in an order dated June 21, 1983. On March 18, 1985, the district court entered its "Findings of Fact and Conclusions of Law Pursuant to Remand" and denied Respondent federal habeas corpus relief. The district court also denied Respondent Dungee's motion for leave to amend his application for federal habeas corpus relief on February 11, 1986.

(vi) Final Orders of the Eleventh Circuit Involving All Three Respondents

On appeal by Respondents to the Eleventh Circuit, a panel of that Court, in an order dated December 9, 1985, granted Respondents federal habeas corpus relief, finding

that Respondents had demonstrated that they had not received a fair trial before an impartial jury. *Coleman v. Kemp,* 778 F.2d 1487 (11th Cir. 1985) and *Isaacs v. Kemp,* 778 F.2d 1482 (11th Cir. 1985). (*See* Appendices, Vol. I., Document No. 5 and Vol. II, Document No. 5).

Petitions for rehearing filed by Petitioner Kemp in all three cases were denied on January 31, 1986. (*See* Appendices, Vol. I, Document No. 5 and Volume II, Document No. 5).

(vii) Statement of the Facts.

As already noted, Respondents Wayne Carl Coleman, Carl J. Isaacs, and George Elder Dungee were indicted for the execution style murders of six members of the Alday family in Seminole County, Georgia. Each Respondent was tried separately from his co-defendants and a detailed statement of the facts at trial is set out in the opinion of the Supreme Court of Georgia in the case of Respondent Coleman. *Coleman v. State,* 237 Ga. 84, 226 S.E.2d 91 (1976), *cert. denied,* 431 U.S. 909, *rhng. denied,* 431 U.S. 961 (1977).

The evidence produced at the three trials was substantially the same and showed that in the early part of May, 1973, Respondent Carl Isaacs was successful in locating his brother, Billy Isaacs, in Baltimore, Maryland, after

Carl Isaacs had escaped from a correctional institution. (T. 800, 838). Accompanying Carl Isaacs was Wayne Carl Coleman, (who was Billy Isaacs' half-brother) and George Elder Dungee. (T. 800, 838). According to Billy Isaacs, who testified at all three of his co-indictee's trials, the four men met in Baltimore, Maryland, and although they did not have an automobile when they met, by the following day they had "taken possession" of one. (T. 839, 841). Then, the four men began the trip which culminated in the murders of the six members of the Alday family in Seminole County, Georgia.

The four men left Maryland, traveled to Pennsylvania, returned to Maryland, then traveled through West Virginia, Virginia, North Carolina, South Carolina, Georgia and Florida. Upon returning to Georgia from Florida, they entered Seminole County and eventually stopped at the Alday trailer home. (T. 502-503, 800-801, 847). The men stopped at the Alday home for the purpose of stealing another car and obtaining money, food and gasoline. (T. 919). Upon arriving at the Alday home at approximately 4:00 to 4:30 p.m. on May 14, 1973, Carl Isaacs knocked on the door and when no one answered, he and Coleman broke into the trailer. (T. 801-802, 848). Within three or four minutes, Coleman came to the door and motioned for Billy Isaacs to approach the trailer. Then, Coleman handed Billy Isaacs a camera and a piggy bank containing money, to be placed in the car. (T. 802).

As Billy Isaacs returned to the car with the stolen items, he saw Ned Alday and Jerry Alday approaching the trailer home in a jeep. (T. 802). When Jerry and Ned Alday arrived they were taken at gunpoint into the trailer and forced to sit on the kitchen floor while the trail-

er was searched for guns and money. (T. 802-804, 920). Shortly thereafter, Carl Isaacs took Jerry Alday into the south bedroom of the trailer, while Coleman took Ned Alday into the north bedroom of the trailer. (T. 804). Numerous gunshots were heard from each bedroom. (T. 804). Ned Alday was discovered in the north bedroom of the trailer with five bullet wounds to the right side of his face and two bullet wounds to the side and back of his head. (T. 515, 564). All five bullet wounds to the side of the face penetrated the brain and were the cause of death. (T. 564). The wounds were the result of bullets fired from both .22 caliber and .32 caliber pistols. (T. 564). Jerry Alday, the son of Ned Alday, was found in the south bedroom of the trailer home. (T. 500, 515). Jerry Alday had been shot four times in the back of the head with a .22 caliber pistol. These wounds to his head were the cause of Jerry Alday's death. (T. 560, 561).

Before Ned and Jerry Alday were murdered, Respondents learned that Jerry Alday's wife would be coming home shortly. Respondents decided to wait for her for the purpose of raping her. (T. 800-805, 922). However, before Mary Alday arrived home, Jimmy Alday arrived at the trailer on a John Deere tractor. (T. 506-507, 805). Jimmy Alday was met at the door of the trailer by Respondent Coleman. (T. 805). After being robbed, Jimmy Alday was forced to lie on the sofa in the living room where he also was shot in the head. (T. 806-807). Jimmy Alday was ultimately found with two .22 caliber bullet wounds to the back of the head, which caused his death. (T. 515, 528, 562).

Unfortunately, a short time thereafter, Mary Alday arrived at the trailer home. (T. 808). Carl Isaacs forced

her at gunpoint into the kitchen where Billy Isaacs, Coleman and Dungee were waiting. (T. 808). While Mary Alday was being robbed (T. 808-809), Aubrey Alday and Chester Alday arrived at the trailer. (T. 509-510, 809). They also were forced at gunpoint into the trailer. (T. 810).

Carl Isaacs and George Dungee forced Mary Alday into the bathroom located on the north side of the trailer home. (T. 810). Carl Isaacs returned to the kitchen, but left George Dungee in the bathroom with Mary. Coleman then took Chester Alday into the north bedroom and Carl Isaacs took Aubrey Alday into the south bedroom. (T. 810). Several shots were heard coming from the north bedroom, while clicking noises were heard coming from the south bedroom. (T. 810). Carl Isaacs then came running from the south bedroom and grabbed a .38 caliber pistol from Billy Isaacs.

Carl Isaacs returned to the bedroom where Aubrey Alday was and several shots were immediately heard. (T. 810-811). When Carl Isaacs returned to the kitchen, he was laughing and said that Aubrey had begged for mercy. (T. 811). Chester Alday, also Ned Alday's son, was found in the north bedroom of the trailer lying on the same bed where his father lay slain. (T. 501, 515). Chester Alday died as a result of a .38 caliber bullet wound to the left side of his head. (T. 570, 573).

Aubrey Alday, Ned's brother, was found in the south bedroom of the trailer home. Aubrey Alday died as the result of a head wound caused by a .38 caliber bullet being fired into the back of his head. (T. 568-570). Next, George Dungee brought Mary Alday out of the bathroom. Billy

Isaacs left the scene to transfer items to Mary Alday's automobile. Billy Isaacs returned to the trailer, he observed Mary Alday lying naked on the kitchen floor. Respondents Coleman, Carl Isaacs and George Dungee proceeded to rape Mary. (T. 812-813, 924).

The Respondents kidnapped Mary Alday. Carl Isaacs drove Mary's car, while she was forced into the back seat with George Dungee. (T. 813, 925). Respondent Coleman and Billy Isaacs followed in their car. After leaving the Alday trailer, the two cars were observed by Mr. Jerry Godby. (T. 602). Eventually, the automobiles were driven into a wooded area, where Billy Isaacs and Respondent Coleman attempted to remove fingerprints from their vehicle. (T. 815, 926).

Carl Isaacs had stopped Mary Alday's automobile a short distance from where Coleman and Billy Isaacs had abandoned their car. When they returned to Carl Isaacs' location, Isaacs started laughing and asked if anyone wanted to have sexual intercourse again with Mary Alday. (T. 816). At that point, Mary Alday was again raped by Carl Isaacs and George Dungee. Carl Isaacs attempted to force Mary Alday to perform fellatio on him, but she refused. Carl Isaacs then struck her on the side of the head with his fist and proceeded to have anal intercourse with her. (T. 816). Mary Alday was eventually forced to lie face down on the ground while still naked. She was shot twice in the head with a .22 caliber pistol by George Dungee. Dungee removed a watch from her wrist. (T. 531, 556, 567). An examination of Mary's body revealed bruises on the right side of her head, on the top of her head and over her right eye. There were also fingernail markings on

the right side of her throat and a long scratch running from her right ear almost to her chin. She suffered a bruise to her right breast. A vaginal examination revealed the presence of seminal fluid. (T. 556, 568).

The four men then traveled to Alabama in Mary Alday's automobile, where they stole an automobile license tag and eventually, as a result of a mechanical failure, were forced to steal another automobile. They attempted to wipe the fingerprints from the automobile they abandoned and discarded most of the items which they had taken since leaving Maryland. (T. 817-819).

Mary Alday's automobile was eventually discovered in Alabama. A comparison of the hood portion of her automobile with the tail light assembly of the vehicle abandoned at the same location where Mary's body was found established that the vehicles had made contact with one another. (T. 650, 729). There was testimony at trial that Carl Isaacs had used Mary Alday's car to push the other vehicle in order to start it. (T. 813-814, 925).

Fingerprints of Coleman, Carl Isaacs, Billy Isaacs and George Dungee were found and identified as follows: the fingerprints of Coleman, Carl Isaacs and Billy Isaacs were found on the automobile located near the body of Mary Alday (T. 761, 764-765); Coleman's finge prints were found on a beer can located on the table in the kitchen in the Alday trailer home (T. 766, 767); Carl Isaacs' fingerprints were found on a file cabinet in the trailer home (T. 767); George Dungee's fingerprints were lifted from a beer can found outside the trailer home on the ground (T. 768); Billy Isaacs' fingerprints were found on a camera located in the trailer home (T. 769); Carl Isaacs'

fingerprints were lifted from a road map found in the abandoned vehicle near Mary Alday's body (T. 769) and the fingerprints of Carl Isaacs and Billy Isaacs were lifted from Mary Alday's automobile which was located in Sumter County, Alabama. (T. 771, 772).

After murdering Mary Alday, the four men made their way to Alabama and eventually drove to West Virginia where they were captured. (T. 819, 696-699). A .22 caliber pistol was found at the scene of the arrest. (T. 699, 700). At the time of George Dungee's capture and arrest, he had Mary Alday's Timex watch and was in possession of a .32 caliber pistol. (T. 688-690). Within ten yards of the vehicle which was found abandoned in West Virginia, a .38 caliber automatic weapon was also found. (T. 693).

Any further facts will be referred to as is necessary for a more thorough discussion of any of the issues raised in this petition for a writ of certiorari.

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PART TWO

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE PRESUMED PREJUDICE STANDARD OF RIDEAU V. LOUISIANA, 373 U.S. 726 (1963) IS STILL VALID IN LIGHT OF THE PRESUMPTION OF CORRECTNESS SET FORTH IN 28 U.S.C. § 2254(d) AND THE SPECIAL DEFERENCE DUE STATE COURT FINDINGS OF JUROR IMPARTIALITY.

Utilizing the "rarely applied" presumed prejudice standard of *Rideau v. Louisiana*, 373 U.S. 723 (1963) the

United States Court of Appeals for the Eleventh Circuit granted federal habeas corpus relief to the Respondents, finding that pretrial publicity allegedly deprived the Respondents of fundamentally fair trials. *See Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976). The circuit court arbitrarily exercised its power as a federal habeas corpus court in resorting to the presumed prejudice standard without first addressing and giving deference to the record of the voir dire proceedings of the Respondents' trials and the state courts' findings of fact as to the lack of necessity for a change of venue and the existence of juror impartiality. Petitioner submits that the presumed prejudice standard of *Rideau* has been modified by the more recent decisions of this Court stressing the presumption of correctness due state courts' findings of fact, in general, and the special deference due to findings of juror impartiality.

As already noted, in denying Respondents' direct appeals raising the issue of alleged pretrial publicity, the Supreme Court of Georgia found the jurors impanelled in those cases to be impartial. *Coleman v. State, supra* at 90-91; *Isaacs v. State,* 237 Ga. 105, 226 S.E.2d 922 (1976); *Dungee v. State,* 237 Ga. 218, 227 S.E.2d 746 (1976). The factual findings of the trial court on Respondents' consolidated motion for a change of venue and the findings of the Supreme Court of Georgia made upon reviewing the appeals of Respondents were totally ignored by the circuit court prior to embarking on a presumed prejudice analysis and were further ignored by the circuit court in applying the presumed prejudice equation. The circuit court not only gave no "special deference" to the jurors' statements of impartiality, as required by this Court's

decisions in *Patton v. Yount,* 467 U.S. —, 104 S.Ct. —, 81 L.Ed.2d 847 (1984) and *Rushen v. Spain,* — U.S. —, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983), but accorded no deference at all to the voir dire proceedings or the findings of the state courts. *Coleman v. Kemp,* 778 F.2d 1487, 1489 (11th Cir. 1985).

Affording no consideration to the absence of a demonstration of actual prejudice, or to the voir dire proceedings themselves or to the factual findings made by the trial court and the Supreme Court of Georgia, the circuit court immediately began its presumed prejudice analysis by simply reciting the limited number of cases applying the "presumed prejudice principle" and narrating the publicity given to Respondents' cases. The circuit court then simply substituted its judgment for those made by the state courts, acting as a finder of fact as to juror impartiality in the manner of a "super State Supreme Court". *See Shaw v. Boney,* 695 F.2d 528 (11th Cir. 1983).

Although the circuit court noted, "In fact, our research has uncovered only a very few additional cases in which relief was granted on the basis of presumed prejudice", the court did not hesitate in resorting to this rarely applied principle, totally ignoring any discussion of whether actual prejudice existed. *See Coleman v. Kemp, supra,* at 1490. In so doing, the circuit court ignored the clear instructions of this Court that courts of appeals exercising the narrow review of habeas corpus *must* accord factual findings of states courts a "high measure of deference" pursuant to 28 U.S.C. § 2254(d). *Sumner v. Mata,* 455 U.S. 591, 101 S.Ct. 764 (1982); *Marshall v. Lonberger,* 459 U.S. 422, 432, 103 S.Ct. 843 (1983). In short, the circuit court took upon

itself the role of the trial court and the Supreme Court of Georgia and totally disregarded the jurors' statements during the voir dire proceedings. The circuit court examined pretrial publicity in a vacuum, which examination did not include references to the voir dire proceedings themselves. Nor did the circuit court appropriately take into account the admittedly controlled courtroom atmosphere in which the three trials were conducted. *Coleman v. Kemp,* 778 F.2d 1487, 1540 n.23 (11th Cir. 1985).

The circuit court chose to utilize the presumed prejudice standard of *Rideau v. Louisiana, supra,* without addressing the correlation between the presumption of correctness due to jurors' statements as to impartiality set forth in 28 U.S.C. § 2254. Petitioner submits that the effect of the presumption of correctness and the special deference due to state court factual findings as to juror impartiality on the *Rideau* presumed prejudice principle is a matter of first impression and presents a substantial question which this Court should address. This Court noted in *Patton v. Yount, supra,* the increasing frequency with which claims are being made that prejudicial publicity has denied a federal habeas corpus petitioner a fair trial. *Patton v. Yount, supra* at 854. Therefore, this Court should address the issue of whether *Rideau* has been modified or repealed in light of the presumption of correctness.

II. ASSUMING THE CONTINUED VIABILITY OF THE PRESUMED PREJUDICE PRINCIPLE, THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHAT CONSTITUTES THE "TOTALITY OF THE CIRCUMSTANCES" TO BE REVIEWED IN A PRESUMED PREJUDICE ANALYSIS.

In applying the presumed prejudice principle, the circuit court gave passing recognition to the controlled courtroom atmosphere and the fact that the Respondents presented no evidence in their defense, when these factors, as well as the nature of the voir dire proceedings themselves and the content of the publicity, should have been examined, even assuming that a presumed prejudice analysis was appropriate. While the circuit court stated that it had reviewed the "totality of the circumstances," even a cursory review of the record shows that the true totality of the circumstances was ignored by the circuit court. *Coleman v. Kemp, supra,* at 1538.

While the circuit court made reference to the "extremely heavy burden" resting upon a petitioner to show that pretrial publicity deprived him of his right to a fair trial by an impartial jury, the circuit court found that Respondents had met their burdens solely by showing the sources and volume of pretrial publicity. Although the circuit court concluded that the record presented a "community that was deeply prejudiced as to both guilt and sentence," the court's conclusion is fatally flawed, for in reaching this conclusion the panel did not properly examine the actual totality of the circumstances. *Id.* Rather, the circuit court unduly relied on one factor, i.e., the volume of publicity concerning the crimes and the Respond-

ents. The circuit court did not properly take into consideration, under a proper totality of the circumstances review, the following illustrative factors: the overall nature of the publicity, i.e., its content; the points in time at which that publicity occurred; the fact that the majority of the newspaper coverage was straightforward and accurate; the fact that authority figures including the Sheriff and surviving members of the Alday family encouraged Seminole County citizens to allow the judicial system to deal with the crimes; that the special prosecutor and members of the prosecution team made limited statements to the press; that some of the articles established mitigating factors about Respondents; that references to the explicit testimony of Billy Isaacs were accurate and that the content of Billy Isaacs' testimony was not revealed prior to the first trial; the total lack of evidence of any mob violence or threats to Respondents; and the fact that many of the news reports concerning the crimes came not from local media, but from the Atlanta newspapers some 230 miles away.

In *Mayola v. State of Alabama*, 623 F.2d 992, 997 n.4 (5th Cir. 1980) the Fifth Circuit noted that an examination of the relevant cases utilizing the vehicle of presumed prejudice to reverse convictions reveals that:

> . . . [E]ach of these cases has either "turned on factors other than [or in addition to] pretrial publicity or [has actually] involved the Court in an examination to determine whether the trial was *in fact* unfair." (Cites omitted).

The circuit court in the instant cases even conceded that:

> The actual trial in this case was conducted by Judge Geer with decorum and dignity. Thus, there was no

> "circus atmosphere" which might have aggravated the atmosphere generated by the pretrial publicity, as in *Sheppard v. Maxwell,* 384 U.S. 333 (1966); and *Estes v. Texas,* 381 U.S. 532 (1965). To the contrary, the trial atmosphere here was a positive contribution to the totality of the circumstances.

Coleman v. Kemp, supra, at 1540 n.23.

On the basis of their superficial review of the totality of the circumstances, the circuit court found that the evidence "compelled" a finding of presumptive prejudice. In making this finding the circuit court utilized the "small town syndrome" and assumed that small, rural communities have preconceived notions as to guilt or innocence and/or sentence in widely publicized murder cases, without a recognition of the technological advances which have established a global community where news of any criminal matter can be and usually is widely disseminated.

The validity of the "small town syndrome" in presuming prejudice in light of technological advances in mass communication is a substantial question which demands this Court's attention. The prosecution in Respondents' cases is being penalized for the publicity-generating nature of the acts of the Respondents and the actions of a free press, which actions under the First Amendment, are uncontrolled and uncontrollable by the prosecution. The circuit court ignores the immediate and widespread dissemination of news to the remotest portions of the nation which is now possible and which makes even the smallest rural communities aware of newsworthy events.

Further as Circuit Judge Hill noted in his dissent from the denial of rehearing *en banc:*

> The circuit court failed to articulate a set of guiding principles to engraft upon the "rather bare bones" of *Rideau v. Louisiana, supra.*

(Appendix Volume I, document 5, pp. 217-218).

Therefore, if the presumed prejudice standard of *Rideau* is still a viable principle, the "bare bones" of *Rideau* should be fleshed out by this Court to define the totality of the circumstances which should be considered in making a presumed prejudice analysis and whether or not such principles as the "small town syndrome" are still valid in light of the state of technology in the area of mass communications. These types of policy decisions are matters which address themselves most appropriately to this Court and are squarely presented to this Court in the context of these cases. If presumed prejudice is still to be applied, this Court needs to provide guidance as to the manner in which the principle should be affected by the presumption of correctness and what factors constitute the totality of the circumstances under a presumed prejudice analysis. Such guidance is especially necessary since this Court recognized in *Patton v. Yount, supra* that the problem of pervasive publicity is one that frequently arises in sensational criminal cases. *Patton v. Yount, supra* at 854.

———o———

CONCLUSION

Therefore, due to the changes in the case law since *Rideau* as well as the technological advances which have taken place since *Rideau,* there is a compelling necessity for guidance in reviewing claims concerning the effect

of pretrial publicity on the right to a fair trial which requires the granting of a writ of certiorari by this Court.

Respectfully submitted,

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85-1652

No. .....

Supreme Court, U.S.
FILED
APR 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

RALPH KEMP, WARDEN,
Petitioner,

v.

WAYNE CARL COLEMAN,
CARL J. ISAACS, AND
GEORGE ELDER DUNGEE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

APPENDIX VOLUME I

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

THOMASVILLE DIVISION

CIVIL ACTION NO. 81-42-THOM.

WAYNE CARL COLEMAN,

Petitioner

VS.

WALTER D. ZANT, WARDEN, GEORGIA
DIAGNOSTIC AND CLASSIFICATION CENTER

Respondent

J U D G M E N T

(Filed March 11, 1982)

Pursuant to an Opinion and Order of Judge J. Robert Elliott, United States District Judge, signed on March 10, 1982 and filed on March 11, 1982 and for the reasons contained therein;

IT IS ORDERED AND ADJUDGED that Petitioner's federal habeas corpus relief under 28 U.S.C. § 2254 is DENIED.

This 11th day of March, 1982.

GIRARD W. HAWKINS,
CLERK

By: /s/ J. Lundie Smith
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

CIVIL ACTION NO. 81-42-THOM

WAYNE CARL COLEMAN,
Petitioner

v.

WALTER D. ZANT, Warden, Georgia Diagnostic and Classification Center,
Respondent

OPINION AND ORDER

(Filed March 11, 1982)

The Petitioner, an inmate at Georgia Diagnostic and Classification Center, Butts County, Georgia brings this habeas corpus action to challenge his convictions on six counts of malice murder, and death sentences imposed pursuant thereto. Petitioner's convictions were returned in the Superior Court of Seminole County on January 17, 1974, and his death penalties were imposed on January 18, 1974. In this habeas corpus action Petitoner has raised the following twenty-five grounds.[1]

Petitioner asserts that his constitutional rights have been violated as a result of: (1) the massive, prejudicial pre-trial publicity and the trial court's denial of his motion for a change of venue; (2) the state's utilization of a special prosecutor hired by the friends and family of the victims; (3) the trial judge's failure to recuse himself; (4) the trial judge's excusal or failure to excuse certain prospective jurors for cause; (5) the prosecutor's use of

---

[1] To the extent appropriate, each issue will be discussed in the order listed in the petition; however, related issues may be jointly discussed within one section of this opinion.

peremptory jury challenges in a racially biased manner; (6) ineffective assistance of counsel prior to and during Petitioner's trial; (7) the alleged failure of Petitioner's trial judge to reveal the contents of a probation report which was used during sentencing; (8) as a result of the unconstitutional composition of Petitioner's traverse jury, said jury allegedly containing an underrepresentation of women, blacks, poor people, young people and teachers and allegedly being conviction prone; (9) deliberate, prosecutorial misconduct consisting of attempts to inflame the racial sentiments of the jury; (10) the presence of an investigating officer at the prosecution table during Petitioner's trial; (11) the establishment of the *corpus delicti* through incompetent testimony; (12) the introduction of incompetent fingerprint testimony from an allegedly unqualified expert; (13) the introduction of incompetent and incorrect ballistics evidence; (14) improper prosecutorial comments pertaining to other crimes committed by the Petitioner and his co-defendants not involved in the Petitioner's case; (15) jury instructions during the guilt/innocence phase of Petitioner's trial which allegedly shifted the burden of proof to him and relieved the state from proving all of the elements of the crimes charged; (16) inadequate jury instructions during the sentencing phase of Petitioner's trial; (17), (18) the unconstitutional composition of Petitioner's grand and traverse juries as a result of the alleged systematic exclusion of women, blacks and eighteen—thirty year olds; (19) an inadequate appellate review by the Georgia Supreme Court on the question of punishment; (20), (21), (22) unconstitutional imposition of the Petitioner's death penalty as a result of it being arbitrarily and capriciously imposed, in a discriminatory fashion, and without any theoretical justification; and

(23), (24) the denial of a fair, representative cross-section of the community, and the creation of a prosecution-prone jury as a result of the exclusion from Petitioner's traverse jury, of those jurors who were conscientiously opposed to capital punishment.

The facts surrounding Petitioner's unlawful acts are not in dispute; nor have they been denied by him. A detailed summary of the evidence which the jury was authorized to find, is set out in the Georgia Supreme Court's opinion in *Coleman v. State,* 237 Ga. 84, 226 S.E.2d 911 (1976), *cert. den., Coleman v. Georgia,* 431 U.S. 909 (1977), *rehng. den.,* 431 U.S. 961 (1977). For purposes of this order, it is sufficient to recite that the evidence overwhelmingly showed that Petitioner and his co-defendants, Carl J. Issacs, Billy Isaacs and George Elder Dungee, in the course of the burglary of the mobile home of Jerry Alday, brutally executed six members of the Alday family, including Jerry Alday, Ned Alday, Jimmy Alday, Aubrey Alday, Jester A. Alday and Mary Campbell Alday. The evidence also showed that victim Mary Alday was raped by two or more of the co-defendants while at the mobile home, and was kidnapped and taken to a wooded area approximately six miles from the mobile home, where she was again raped by the Petitioner and one of his co-defendants, as well as being beaten and mutilated for refusing to commit oral sodomy. Petitioner and his co-defendants fled to Alabama immediately after the murders, but eventually were captured in West Virginia several days later.

Petitioner was tried separately from his co-defendants on January 14 through January 18, 1974, was found guilty on all six counts of malice murder, and received

the death penalty on each count. His convictions and sentences were affirmed by the Georgia Supreme Court on direct appeal, and his petition for certiorari and motion for rehearing in the United States Supreme Court were denied. *Coleman v. State, supra.*

Following the scheduling of a new execution date, Petitioner filed a state habeas corpus action in the Superior Court of Tattnall County. Evidentiary hearings were held on July 27, 1979 and January 25, 1980, and thereafter the state habeas judge denied relief on June 13, 1980. The Georgia Supreme Court rejected Coleman's application for a certificate of probable cause to appeal on October 31, 1980 and the United States Supreme Court rejected his second application for a writ of certiorari and motion for rehearing. *Coleman v. Balkcom*, — U.S. —, 101 S.Ct. 2031 (1981), *rehng. den.*, — U.S. —, 101 S.Ct. 3100 (1981).

Thereafter, Petitioner filed this federal habeas corpus action, raising the aforesaid grounds, which were previously raised in the state habeas proceeding or on appeal to the Georgia Supreme Court. Respondent concedes, and this Court finds, that Petitioner has fully exhausted his available state remedies.

The first allegation raised in the petition pertains to the denial of Petitioner's motion for a change of venue. Petitioner asserts that the atmosphere existing in Seminole County, Georgia after the crimes and during his trial demonstrated such inherent and actual prejudice that Petitioner was denied a fair and impartial trial in violation of his Eighth and Fourteenth Amendment rights.

The record before this Court shows that Petitioner and his co-defendants, George Dungee and Carl Isaacs, filed motions for a change of venue, and consolidated hearings were held on these motions on September 27, 1973 and on October 9, 1973. After hearing testimony from various witnesses, and reviewing the documentary evidence proffered in support of the motions, they were denied. The motion for a change of venue in Petitioner's case was renewed at the start of his trial, with defense counsel arguing that publicity from the previous trials of Petitioner's co-defendants, in addition to the pretrial publicity, had so prejudiced the community that obtaining a fair and impartial jury was impossible. After an extensive jury voir dire, which covered approximately five hundred pages in the trial transcript, the Superior Court denied the renewed motion for change of venue.

The trial court's ruling on the denial of the venue motion was thoroughly reviewed by the Georgia Supreme Court on direct appeal of Petitioner's conviction. *Coleman v. State, supra.* Said court engaged in a detailed analysis of the jury voir dire, and concluded that the jurors who actually sat at Petitioner's trial had actually demonstrated their impartiality. As was recognized by the Georgia Supreme Court, the test for determining whether an accused was denied the right to a fair trial by a panel of impartial jurors, as set forth in *Irvin v. Dowd,* 366 U.S. 717 (1961), is whether jurors can lay aside their impressions or opinions and render a verdict based upon the evidence presented in court. *Id.,* at p. 722-723. In formulating this test the United States Supreme Court had stated that jurors are not required to be totally ignorant of the facts and issues involved, and in fact, scarcely any

of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. *Id.; Murphy v. Florida,* 421 U.S. 794, 799-800 (1975). This Court has thoroughly and in detail reviewed the extensive jury voir dire, and agrees with the conclusion of the Georgia Supreme Court that actual prejudice had not found its way onto Petitioner's jury panel.

However, this does not end our evaluation of this issue. It is now clear that in order to find that a criminal defendant did not receive a fair trial because of pretrial publicity, he must show: (1) that the jury selection process demonstrated actual prejudice resulting from the pretrial publicity, or (2) the setting of the trial was so inflammatory or prejudicial as to render virtually impossible a fair trial by an impartial jury drawn from the community. It has been held that under this latter circumstance, prejudice may be presumed. *See, Mayola v. State of Alabama,* 623 F2d 992, 996-997 (5 Cir. 1980), *cert. den.,* — U.S. —, 101 S.Ct. 1986 (1981); *United States v. Capo,* 595 F2d 1086, 1090 (5 Cir. 1979), *cert. den.,* 444 U.S. 1012 (1980). However, juror exposure to news accounts of the crime with which the defendant is charged does not, standing alone, presumptively deprive a defendant of due process. *Baldwin v. Blackburn,* 653 F2d 942, 948 (5 Cir. 1981), *citing Murphy v. Florida, supra,* at p. 799.

The Georgia Supreme Court, in reviewing Petitioner's case, also found no evidence of the "total inundation of the judicial process by the media" as was found by the United States Supreme Court in such cases as *Estes v. Texas,* 381 U.S. 532 (1965) and *Sheppard v. Maxwell,* 384 U.S. 333 (1966). In both of those cases, the publicity saturated the immediately surrounding community with ar-

ticles concerning the crime in addition to the news media also creating a "carnival atmosphere" during the trial of the defendant. Such was not the case here. For example, at Petitioner's state habeas corpus hearing, Albany Herald State Editor, Charles Postelle, testified that while although it was clear that the accounts of the crimes for which Petitioner had been charged, attracted great interest from the media; and although at the time of the incident feelings in the community were quite high; nevertheless, by the time of the trial the county was very calm.

As has been noted in *Mayola v. State of Alabama, supra,* at p. 997 and *Rideau v. Louisiana,* 373 U.S. 723 (1963), the principle of presumptive prejudice is only rarely applicable, and is confined to those instances where the defendant can demonstrate an extreme situation of inflammatory pretrial publicity that literally saturated the community in which his trial was held. Neither the testimony during Petitioner's trial, nor the evidence presented at his state habeas hearing, demonstrates sufficient inflammatory publicity from which this Court may presume prejudice. A review of the newspaper and magazine articles show that they consist almost entirely of factual reporting which was reflected in the unrebutted evidence at Petitioner's trial.

This Court has also examined the potential for prejudice in light of the evidence presented at Petitioner's trial. The record shows that the evidence was overwhelming, and included Petitioner's own confessions and the testimony from one of his co-defendants. Petitioner presented no defense, and except for the argument of his counsel, offered nothing in mitigation. After reviewing the totality

of the record before this Court,[2] it cannot be said that Petitioner's rights to due process or a fundamentally fair trial have been violated as a result of the trial court's refusal to grant his motion for a change of venue.

Finally, the record also shows that Petitioner did not exhaust his peremptory challenges to the potential jurors. Although not conclusive, this factor has also been taken into consideration in determining whether or not the trial court abused its discretion in refusing to grant the change of venue. *See United States v. Moran,* 236 F2d 361 (2 Cir. 1956), *cert. den.,* 352 U.S. 909 (1956); *Meador v. United States,* 341 F2d 381 (9 Cir. 1965).

Under Petitioner's second ground, he claims that his Sixth, Eighth and Fourteenth Amendment rights were violated as a result of the State's utilization of a special prosecutor, Mr. Peter Zack Geer, who was hired by the friends and family of the victims. Recently in *Woods v. Linahan,* 648 F2d 973 (5 Cir. 1981), the court had occasion to address this same issue. Although criticizing the use of special prosecutors, the court refused to find reversible, constitutional error under the standard announced in *Powers v. Hauck,* 399 F2d 322 (5 Cir. 1968) where the court held that:

> "The mere participation of a special prosecutor alone is not sufficient grounds to show a denial of due pro-

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[2] In addition to reviewing the record of Petitioner's trial in the Superior Court of Seminole County and the state habeas corpus proceeding in the Superior Court of Tattnall County, Georgia, this Court has also examined, in detail, the greatly expanded record which was presented on the venue issue in the habeas corpus action filed by Petitioner's co-defendants Carl Isaacs and George Dungee. *Isaacs, et al. v. Zant,* C.A. No. 80-71-THOM (USDC MDGa.).

> cess, without some additional showing of a violation of the rules relating to prosecuting attorneys.
>
> * * *
>
> There is no constitutional prohibition against the use of special prosecutors, and so long as the criminal district attorney retains control and management of the prosecution, the special prosecutor is not guilty of conduct prejudicial to the defendant, and the rights of the defendant are duly observed, no reason exists why such settled practice, in and of itself, should cause the reversal of a case."
>
> *Powers v. Hauck, supra,* at p. 325;
>
> *Woods v. Linahan, supra,* at p. 976.

Although a review of the trial transcript shows that special prosecutor Geer actively participated in the trial, questioning witnesses and conducting motion hearings; nevertheless, the district attorney was present and in court during all of the proceedings, exercising his firsthand supervision of the prosecution. A review of the entire record amply demonstrates that the special prosecutor remained within the same permissible boundaries as would have constrained the district attorney. There is no evidence that the actions of the special prosecutor operated in any way to deprive Petitioner of due process or a fundamentally fair trial, and it is apparent that Petitioner's rights were duly observed and protected throughout the Seminole County proceedings.

Finally, this Court has taken note that there was no objection at trial to the special prosecutor's participation,

and the issue was not raised on direct appeal to the Georgia Supreme Court. Even potential, constitutional error may be precluded from review in federal habeas corpus, when the petitioner has failed to file an objection at trial, absent a showing of "cause" and "prejudice" for the omission. *Wainwright v. Sykes,* 433 U.S. 72 (1977); *Francis v. Henderson,* 455 U.S. 536 (1976). Under Georgia law, a party may not ignore what he feels to be an injustice, taking his chances on a favorable verdict, then complain later. *Tucker v. State,* 245 Ga. 68, 72, 263 S.E.2d 109 (1980); *Smith v. State,* 244 Ga. 814, 819, 262 S.E.2d 116 (1980). Petitioner's trial counsel testified at the state habeas hearing; nevertheless, there was no testimony elicited pertaining to his failure to object to the special prosecutor's participation in this case. As previously noted, the record fails to demonstrate any actual prejudice which Petitioner suffered through the participation of the special prosecutor. Thus, in addition to finding that Petitioner's due process rights have not been violated, this Court also finds that Petitioner has made an insufficient showing under *Wainwright v. Sykes, supra,* so as to require the granting of habeas relief. *Tyler v. Phelps,* 643 F2d 1095, 1101 (5 Cir. 1981). Thus, based on the record before it, this Court finds there is no merit to Petitioner's second ground for relief.

Petitioner's third ground claims that his Eighth and Fourteenth Amendment rights were violated as a result of the trial judge's refusal to grant Petitioner's motion for recusal based upon the trial judge's relationship with the special prosecutor. A hearing on this motion was held on September 27, 1973, prior to trial. It appears that the trial judge was the uncle of the prosecutor. The trial

judge's refusal to grant the motion was reviewed by the Georgia Supreme Court on the direct appeal of one of Petitioner's co-defendant's convictions. *Dungee v. State,* 237 Ga. 218, 219-220, 227 S.E.2d 746 (1976), *cert. den.,* 429 U.S. 986 (1976). The Georgia Supreme Court found that the motion to recuse the judge was based upon Ga. Code Ann. § 24-102, and there had been an insufficient showing under that Code Section to justify the recusal.[3] Furthermore, the Georgia Supreme Court found that the trial judge's participation did not violate the Georgia code of judicial conduct as it existed at the time of Petitioner's trial. *Dungee v. State, supra,* at p. 220. Normally a state's interpretation of its own statutes or procedural rules does not rise to a constitutional question, cognizable in habeas corpus. *Stewart v. Estelle,* 634 F2d 998, 999 (5 Cir. 1981); *Kemp v. Estelle,* 621 F2d 163 (5 Cir. 1980); *Van Poyck v. Wainwright,* 595 F2d 1083, 1086 (5 Cir. 1979). Thus, Petitioner's claims must fall unless he can show that the trial court's ruling operated to deprive him of due process or a fundamentally fair trial. This Court has thoroughly reviewed the record and transcript of Petitioner's trial and can find no sufficient prejudice or bias on the part of the trial judge constituting a denial of due process. Since Petitioner made an insufficient showing at the September 27, 1973 motion hearing which would have

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[3] Ga. Code Ann. § 25-102 states in pertinent part:

> "No judge or justice of any court . . . shall sit in any cause or proceeding in which he is pecuniarily interested, nor preside, act, or serve, in any case or matter, when such judge is related by consanguinity or affinity to any party interested in the result of the case or matter, within the sixth degree, as computed according to the civil law, . . ."

justified the recusal of the trial judge under Georgia law, and since this Court's review of Petitioner's trial showed that he was not materially prejudiced by any improper actions or rulings by the trial judge during the course of Petitioner's trial, this Court concludes that there is no merit to Petitioner's third ground for relief.

Petitioner's fourth contention under Section D of the petition claims that his Eighth and Fourteenth Amendment rights under the United States Constitution were violated as the result of the trial judge's conduct during voir dire, excusing certain jurors for cause while refusing to excuse others. Petitioner cites that several jurors who had extensive knowledge of the case, were actually permitted to serve on the jury, while others were excused *sua sponte* by the trial judge even though they allegedly exhibited an ability to render a fair verdict. Petitioner specifically refers to juror G. J. Herring contending that he was improperly excused for cause even though he had expressed an ability to render an impartial verdict. Petitioner also cites that several jurors were improperly excused for cause because of their opposition to capital punishment.

It is well established that the conduct of jury voir dire lies largely within the discretion of the trial court, subject to the essential demands of fairness. *United States v. Booher,* 641 F2d 218, 219 (5 Cir. 1981); *United States v. Morgan,* 562 F2d 1001, 1002 (5 Cir. 1977); see *United States v. Costner,* 646 F2d 234, 236 (5 Cir. 1981). Of course, the constitutional standard of fundamental fairness requires that a defendant have a panel of impartial, indifferent jurors. *Passman v. Blackburn,* 652 F2d 559, 567 (5 Cir. 1981), *citing Irvin v. Dowd, supra,* 366 U.S.

at p. 722. In order to rise to constitutional dimension, the excusal or refusal to excuse a juror for cause must be so prejudicial as to deprive petitioner of due process. *Passman v. Blackburn, supra.*

This Court has thoroughly reviewed the voir dire transcript, and has found that there were no jurors improperly excluded for cause under *Witherspoon v. Illinois,* 391 U.S. 510 (1968). Additionally, the trial court did not abuse its discretion in refusing to strike jurors for cause even though they may have had some knowledge of the case, when those jurors indicated that they could decide the case on the facts and the law which was before them, and be perfectly impartial. Other jurors were properly excused for cause.

For example, juror G. R. Herring, whom Petitioner contends was improperly excused, exhibited a potential bias which may have been potentially detrimental to the Petitioner. Juror Herring had intimated that there would be strong pressures in the community to convict the Petitioner, because of Herring's position as a pastor in the local community. (T. 319, 321). Jurors Brown and Brannon, specifically cited in the petition, appear to have been excused because they exhibited a potential for bias against the Petitioner. Juror Brown indicated his opinion that the Petitioner was already guilty before the trial had begun, and juror Brannon indicated her belief that it was necessary for the Petitioner to come forward with evidence. (T. 386, 413-414). Juror Ingram was excused because he stated his opposition to capital punishment in all cases, and because he was unsure as to whether or not he could be impartial on the question of guilt or innocence. (T. 405-

406). Applicant cites the trial court's refusal to strike juror Hines for cause, even though she had testified in two previous trials as a witness, and was also scheduled as a witness in Applicant's trial. Under Georgia law a juror is not disqualified from serving, simply because he may be called as a witness in the case. Neither is a witness automatically declared incompetent, simply because he is a juror. *See, Tumlin v. State,* 88 Ga. App. 713, 77 S.E.2d 555 (1953); *Jacobs v. State,* 1 Ga. App. 519, 57 S.E.2d 1063 (1907); *Paschal v. State,* 230 Ga. 859, 199 S.E.2d 803 (1973); Ga. Code Ann. § 110-108. The voir dire transcript reflects that juror Hines verified that she testified in the previous cases (T. 479); however, she also stated she had not engaged in discussions with other witnesses concerning their potential testimony, had formed no opinion as to the guilt or innocence of the accused, nor had she discussed the various defendants' potential punishment. She testified that she had not read or heard anything which would have influenced her verdict, and stated she could give the Petitioner a fair trial. Moreover, juror Hines was eventually stricken through the use of a peremptory strike by the defense. (T. 482). The record also shows that Petitioner did not exhaust his peremptory challenges. *See, Van Duyse v. Isreal,* 486 F.Supp. 1382 (E.D. Wisc. 1980); *Mastrian v. McManus,* 554 F2d 813 (8 Cir. 1977), *cert. den.,* 433 U.S. 913 (1977).

In conclusion, after a detailed review of the voir dire transcript, this Court concludes that the Petitioner was not deprived of due process or a fundamentally fair trial through the trial court's conduct of the voir dire, or specifically as a result of the excusal or failure to excuse any particular juror during Petitioner's trial.

Petitioner's fifth, eighth, seventeenth and eighthteenth allegations (Sections E, H, Q and R of the petition) relate to alleged violations of Petitioner's Sixth, Eighth and Fourteenth Amendment rights resulting from the alleged unconstitutional compositions of Petitioner's grand and traverse juries and as a result of the prosecution's use of its preemptory challenges which allegedly operated to systematically exclude black jurors.

Under Georgia law objections to the composition of either the grand or traverse juries must be made at the earliest opportunity. Challenges to the composition of a grand jury must generally be made before the indictment is returned, and a challenge to the traverse jury must be made before the jury is put upon defendant. *Thomas v. State*, 239 Ga. 734, 238 S.E. 888 (1977); *Durham v. State*, 239 Ga. 697, 701, 238 S.E.2d 334 (1977); *Holsey v. State*, 235 Ga. 270, 219 S.E.2d 74 (1975); *Griffin v. State*, 245 Ga. 345, 346, 265 S.E.2d 20 (1980); *Godfrey v. State*, 243 Ga. 302, 305, 253 S.E.2d 710 (1979), *modified on other grounds*, — U.S. — , 100 S.Ct. 1759 (1980).

At the state habeas proceeding Petitioner made an insufficient showing of either cause for his failure to challenge the jury composition or actual prejudice. Petitioner's trial counsel testified at the state habeas hearing that he did not file a pretrial jury challenge, because the jury pool had been reconstituted in August of 1973, and in his opinion there was no illegality. He also testified that there were blacks, males, whites and females on Petitioner's trial jury. Under such circumstances, this Court finds that Petitioner has effectively waived his right to challenge the alleged unconstitutional composition of either his grand

or traverse jury. *Francis v. Henderson,* 425 U.S. 536 (1976); *Dumont v. Estelle,* 513 F2d 793 (5 Cir. 1975); *Tennon v. Ricketts,* 574 F2d 1243 (5 Cir. 1978), *cert. den.,* 439 U.S. 1091 (1979); *Tyler v. Phelps,* 643 F2d 1095, 1101 (5 Cir. 1981).

Petitioner's sixth allegation under Section F of the petition asserts that Petitioner received ineffective assistance of counsel in violation of his Sixth, Eighth and Fourteenth Amendment rights.

Of course, it is well established that under the Sixth Amendment to the United States Constitution, a criminally accused person shall have the right to adequate legal assistance for his defense. *Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980). A defendant has a constitutional right to counsel reasonably likely to render and rendering reasonably effective assistance. *Spivey v. Zant,* 661 F2d 464, 477 (5 Cir. 1981); *Baty v. Balkcom,* 661 F2d 391, 394 (5 Cir. 1981); *Washington v. Estelle,* 648 F2d 276 (5 Cir. 1981). The actual performance of counsel must be examined in light of the totality of the circumstances in the entire record. *Washington v. Watkins,* 655 F2d 1346, 1355 (5 Cir. 1981); *Washington v. Estelle, supra,* 648 F2d at p. 279. The standard does not require errorless counsel, nor counsel judged ineffective by hindsight, and the evaluation of trial counsel's actions must not be viewed through the 20/20 perfect lenses of hindsight. *Winfrey v. Maggio,* 664 F2d 550, 552 (5 Cir. 1981); *United States v. Johnson,* 615 F2d 1125 (5 Cir. 1980); *Lovett v. Florida,* 627 F2d 706 (5 Cir. 1980).

From Petitioner's petition and brief it appears that he contends his trial counsel was ineffective in failing to properly prepare, investigate and present evidence during

the guilt/ innocence phase of Petitioner's trial; in failing to challenge either the grand or traverse jury pools in Seminole County; in failing to conduct a "meaningful" voir dire examination; in failing to prepare, investigate and present evidence during the sentencing phase of Petitioner's trial. Petitioner's lead trial counsel, Mr. Harold Lambert, testified at the state habeas corpus evidentiary hearing that he conferred with Petitioner on several occasions prior to trial, and Petitioner admitted his guilt. Not surprisingly, Petitioner was unable to provide Mr. Lambert with any defense to the charges. A review of the record from the Superior Court of Seminole County shows that Attorney Lambert had filed a motion for a restricted preliminary hearing, a motion for a change of venue, a motion for production of various documents, statements, ballistics and fingerprint analyses and prior criminal convictions, and a motion to disqualify the presiding judge. The record also shows that Attorney Lambert participated in the preliminary hearing in this case, played an active part in the pre-trial motion hearings, and competently cross-examined state witnesses at trial. Defense counsel testified at the state habeas corpus hearing that he spent in excess of 100 hours preparing for the case, and in addition to attending Petitioner's committal hearing, also attended the trials of Petitioner's co-defendants. As this Court has previously noted, it has previously reviewed the records of the trials of Petitioner's co-defendants, and it is relevant to note that the evidence was essentially the same in all three trials. Petitioner was given an opportunity to testify at trial, but he voluntarily chose not to do so under advice of his counsel. This advice was based on counsel's best judgment, after reviewing Petitioner's background, and having knowledge of the competency of the special prosecutor.

After reviewing the evidence and consulting with the Petitioner, defense counsel concluded that the only potential defense in the guilt/innocence phase of the trial or in mitigation during sentencing, pertained to Petitioner's allegedly deprived background. On cross-examination of co-defendant Billy Isaacs, Petitioner's half-brother and state witness at Petitioner's trial, defense counsel elicited some testimony pertaining to the background of the family, and attempted to show that Petitioner had spent a great deal of time in either training school or prison. It also appears that he attempted to show that before, during and after the murders, co-defendant Carl Isaacs, was the actual leader and prime mover in the group. Defense counsel also pointedly cross-examined witness Billy Isaacs, attempting to attack his credibility by intimating to the jury that Isaacs was testifying only to benefit himself.

As noted previously, defense counsel testified he did not file a jury challenge, because the Seminole County grand jury pools had just been revised, and it was his opinion that they were not unconstitutionally composed. Moreover, according to the testimony of Mr. Lambert, Petitioner's trial jury contained blacks, whites, females and males, as did his grand jury. A review of the jury voir dire does not demonstrate ineffectiveness of counsel in this area. Additionally, through Mr. Lambert's closing arguments to the jury, he actually presented Petitioner's only defense.

Finally, in regard to Petitioner's contentions that his attorney was ineffective in failing to investigate, prepare and present evidence in mitigation during the sentencing phase of Petitioner's trial; this Court takes note that at Petitioner's state habeas corpus hearing he produced

neither the names nor testimony of any witnesses, by way of affidavit or otherwise, who would have been willing or able to testify favorably in regard to Petitioner's background, characteristics, or who could have presented any other mitigating evidence. Mr. Coleman's trial took place in January of 1974 and his state habeas corpus hearings took place in July of 1979 and January of 1980, five and one-half and six years after the trial. Defense counsel was aware that under Georgia law, generally anything favorable could have been presented during the sentencing phase of the trial; nevertheless, he had no mitigating evidence, except for the testimony from Billy Isaacs on the Petitioner's background, which had previously been elicited during cross-examination of that witness. Attorney Lambert discussed with Petitioner Coleman that the only potential defense appeared to be his deprived background, and Lambert utilized this in his closing argument. Petitioner knew he had the option of testifying, and could have expounded upon his background; nevertheless, he exhibited no desire to testify, but chose instead to rely on his attorney.

In light of the totality of the circumstances, including the actual actions of Mr. Lambert at trial, his investigation of the case, Petitioner's failure to produce or even name any witnesses who may have produced favorable testimony, this Court finds that Petitioner Coleman received reasonably effective assistance in compliance with the Sixth and Fourteenth Amendments of the United States Constitution.

Petitioner's seventh ground, set out under Section G of the petition, claims that his Sixth, Eighth and Four-

teenth Amendment rights have been violated, because of the trial judge's alleged consideration of an undisclosed probation report prior to sentencing. Petitioner cites *Gardner v. Florida*, 430 U.S. 349 (1977) for the proposition that Petitioner's due process rights were violated through the nondisclosure of information in the probation report. This contention is clearly unmeritorious. Here, the jury recommended the death penalty on all six counts of murder pursuant to Ga. Code Ann. § 27-2534.1(b) (2). Upon this finding and recommendation of death it was incumbent upon the trial court to impose the death sentence. Ga. Code Ann. § 27-2514. Thus, it cannot be said that the trial court utilized an undisclosed probation report in setting Petitioner's death penalty.

Under Petitioner's ninth ground set out under Section I of the petition, he asserts that he was prejudiced by prosecutorial misconduct which allegedly consisted of prosecutorial attempts to inflame the racial sentiments of Petitioner's trial jury by demonstrating that Petitioner had associated with a black co-defendant, who in turn assaulted and killed a white woman, Mary Alday. Obviously, during trial the prosecutor presented evidence to show that Petitioner and his co-defendants, including George Dungee, who was black, had killed all of the victims. Additionally, there was evidence to show that Mr. Dungee as well as Petitioner had attacked and raped Mary Alday.

This evidence in no way established any misconduct by the prosecution, nor did it violate any of Petitioner's constitutional rights. Absent a violation, through prosecutorial misconduct, of a specific guarantee of the Constitution, federal habeas corpus relief will not be granted

unless the prosecutor's conduct renders the trial fundamentally unfair so as to deny a defendant due process. *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974); *Branch v. Estelle,* 631 F2d 1229 (5 Cir. 1980); *Jones v. Estelle,* 622 F2d 124 (1980). Since the record clearly shows that there was no prosecutorial misconduct in regard to the allegations raised under Section I of the petition, and that Petitioner was not deprived of a fundamentally fair trial, this Court finds that there is no merit to his ninth ground.

Likewise, there is no merit to Petitioner's tenth ground set out under Section J of the petition which avers that the presence of the chief investigating officer at counsel's table during trial allegedly operated to deprive Petitioner of due process. This is a matter which addresses itself to the sound discretion of the trial judge. *United States v. Auten,* 570 F2d 1284, 1285 (5 Cir. 1978); *Del Christo v. United States,* 327 F2d 208 (5 Cir. 1964); *Hall v. State,* 239 Ga. 832, 238 S.E.2d 912 (1977). Furthermore, the record shows that the prosecution specifically requested that the investigative officer be permitted to remain in the courtroom, and the defense had no objections. (T. 496).

Under Petitioner's eleventh, twelfth, thirteenth and fourteenth grounds set out under Sections K, L, M, and N of the petition, Petitioner asserts that various admissions of evidence and additional prosecutorial misconduct through references to other crimes committed by Petitioner and his co-defendants, operated to deprive Petitioner of his rights under the Eighth and Fourteenth Amendments to the Constitution. Petitioner contends that the *corpus delicti* was established by a witness not qualified to render an expert opinion as to the cause of death. A

review of the record shows that the defense stipulated to Dr. Howard's qualifications as an expert (T. 550), and furthermore, Dr. Howard's opinion as to the cause of death is supported by his testimony pertaining to the nature and extent of the wounds, and other evidence in the record including the testimony of Petitioner's co-defendant and his own confession to the police. Under Sections L and M, Petitioner's twelfth and thirteenth grounds, he contends that the fingerprint and ballistics testimony was improperly introduced. A review of the record in this case demonstrates that this contention is simply unsupported and unmeritorious. Federal courts possess only limited authority to consider evidentiary admissions by the state courts, and inquiry must be restricted to determining whether evidentiary rulings were so prejudicial as to deny fundamental fairness. *Phillips v. Wainwright*, 624 F2d 585 (5 Cir. 1980); *Nordskog v. Wainwright*, 546 F2d 69 (5 Cir. 1977). Here, contrary to Petitioner's assertions it appears that the aforesaid testimony was properly admissible.

Under Ground N, Petitioner's fourteenth assertion, he contends that the prosecutor engaged in further misconduct by presenting to the jury evidence that Petitioner and his co-defendants had been convicted and incarcerated for other crimes, not connected with those for which Petitioner was being tried. Again, a review of the record shows no impermissible references to prior acts of misconduct, or prosecutorial conduct which denied Petitioner due process or a fundamentally fair trial.

In conclusion, there is no merit to the allegations set out under Sections K through N of the petition.

Petitioner's fifteenth ground, Section O of the petition, asserts that instructions during the guilt/innocence phase of Petitioner's trial operated to violate his Sixth and Fourteenth Amendment rights in that they allegedly created a burden-shifting presumption which relieved the state from proving an essential element of the offenses charged. The following is the complained of portion of the trial court's instructions:

> "A crime is a violation of a Statute of this State in which there shall be union of joint operation of act and intention.
>
> "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted.
>
> "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted."
>
> (T. 1041).

Initially, this Court must address the threshold question of whether the challenged instructions so infected Petitioner's entire trial that the resulting conviction violated due process. *Henderson v. Kibbe,* 431 U.S. 145, 154 (1977); *Cupp v. Naughten,* 414 U.S. 141, 147 (1973). In making this determination, this Court has taken into consideration that the evidence presented against Petitioner was voluminous, overwhelming and included his own confession to the police and the testimony of his co-defendant. The evidence showed that Petitioner was an active participant in the execution-style murder for which he was charged, and there was sufficient evidence to support all of his convictions independent of any presumptions which

may or may not have resulted from the trial court's instructions. Recently in *United States v. Caucci,* 635 F2d 441 (5 Cir. 1985) the Court noted that even a burden-shifting charge does not necessarily, automatically require reversal when there is evidence before the jury of objective conduct demonstrating criminal intent. *Id.,* at p. 447; *citing United States v. Chiantese,* 582 F2d 974, 977 & n. 11 (5 Cir. 1978); *United States v. Spiegel,* 604 F2d 961, 970 (5 Cir. 1979). A transcript of Petitioner's trial in the Superior Court of Seminole County showed the requisite objective conduct demonstrating criminal intent so that even assuming *arguendo,* the challenged instructions were erroneous, they did not deprive Petitioner of due process or a fundamentally fair trial and thus federal habeas corpus relief is not warranted.

Furthermore, a review of the totality of the instructions, in addition to those previously cited, shows that when taken as a whole they would not have created an impermissible "conclusive" presumption similar to that which was found to be impermissible in *Sandstrom v. Montana,* 442 U.S. 510 (1979). Here, Petitioner's trial jury was instructed that the defendant is presumed to be innocent, and that presumption remained with him throughout the entire trial, unless the state overcame the presumption to satisfy the minds of the jury of the Petitioner's guilt beyond a reasonable doubt. The jury was also instructed that the burden of proof rested with the state to show Petitioner's guilt beyond all reasonable doubt. (T. 1039). The trial judge also instructed that a person will not be presumed to act with criminal intention, but the jury could find such intention upon consideration of the words, conduct, demeanor, motive and all other cir-

cumstances connected with the act for which the Petitioner was prosecuted. (T. 1041-1042). The jury was instructed that the burden remained with the state to prove that the Petitioner committed each and every count of murder as charged in the particular count. (T. 1041). The jury was also instructed on the crime of murder as defined under Georgia law. (T. 1042). This Court agrees with the state habeas court that when the totality of the instructions are considered as a whole, a reasonable juror would have understood the challenged instruction to have the effect of creating only a permissive inference which could have been deduced from the state's evidence, and which the jury was free to apply or reject in light of all of the evidence in the case. *See, Skrine v. State,* 244 Ga. 520, 260 S.E.2d 900 (1979); *Bridges v. State,* 246 Ga. 323, 324, 271 S.E.2d 471 (1980); *Ulster County Court v. Allen,* 442 U.S. 140 (1979). Thus, this Court finds that there is no merit to the allegations raised under Section O of the petition pertaining to the instructions during the guilt/innocence phase of Petitioner's trial.

Under Petitioner's sixteenth ground, Section P of the petition, he asserts that the trial court's instructions during the sentencing phase of his trial failed to adequately define and explain the function of mitigating circumstances, and failed to provide the proper guidance on the relationship between aggravating and mitigating circumstances. Recently, in *Spivey v. Zant,* 661 F2d 464 (5 Cir. 1981) the Court held that a death penalty may not stand when the trial court has failed to " 'guide and focus the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . . ' " *Id.,* at p. 471. The court expounded that

"in most cases this will mean the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death in order to do so, the judge will normally tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations." *Id.* The court also noted that there was no constitutional requirement that the actual term "mitigating circumstances" be utilized in the instructions.

Unlike the jury in the *Spivey* case, the jury in the instant case was specifically instructed that in making its determination on sentencing, it was authorized to consider all of the evidence, including any in extenuation or mitigation of punishment. (T. 1058). Also, unlike *Spivey*, the jury in Petitioner's case was specifically instructed that the death penalty was not mandatory, and that even if statutory aggravating circumstances were found, a life sentence could still be imposed. Of course, under the Georgia statute there is no weighing or balancing process; the jury may impose a life sentence even though the aggravating circumstances far outweigh any mitigating circumstances and even though there may be no mitigating circumstances. *Collier v. State,* 244 Ga. 553, 569, 261 S.E. 2d 364 (1979), *cert. den.,* 445 U.S. 946 (1980).

As has previously been noted, a trial court's instructions must be viewed as a whole, and federal habeas corpus relief is available only when the instructions are so erroneous as to deprive an applicant of due process. *Henderson v. Kibbe, supra; Cupp v. Naughten, supra.* Here, in light of the evidence presented at Petitioner's trial, which overwhelmingly demonstrated his guilt and the existence of the statutory aggravating circumstances

charged, this Court cannot conclude that Petitioner's due process rights have been violated, notwithstanding the trial court's failure to define the term mitigating circumstances or to specifically give examples of same. Arguably, in this case, the Petitioner's background may have provided some minute aspect of mitigation, but when the enormity of the crimes is compared with the mere possibility of that mitigating circumstance, this Court cannot conclude that the failure of the trial court to refer to Petitioner's background or to instruct the jury specifically to weigh mitigating factors during deliberation, operated in any manner to violate Petitioner's constitutional rights. In conclusion, this Court finds that when the trial court's sentencing instructions are considered as a whole, they sufficiently guided and focused the jury's discretion in this case to avoid any arbitrariness or capriciousness in the application of Petitioner's death penalty.

Petitioner's grounds nineteen through twenty-two, Sections S, T, U and V of the petition, may be summarized as general attacks on the imposition of the death penalty. Under Section S of the petition Petitioner asserts that the Georgia Supreme Court engaged in an inadequate appellate review on the question of punishment. Under Ground T he complains that the death penalty has been arbitrarily and capriciously imposed in Georga because cases similar to or more aggravated than the Petitioner's have resulted in sentences less than death. He asserts there is no rational way to distinguish those cases from his case. Section U of the petition complains that the death penalty in Georgia has been imposed in a discriminatory fashion against blacks, males, poor persons and defendants accused of killing Caucasians. Under Section V he asserts

the death penalty is unconstitutional, because of a lack of theoretical justification, and because it is insufficient as a deterrent.

Theoretical arguments similar to those propounded by Petitioner were considered and rejected in *Spinkellink v. Wainwright,* 578 F2d 582 (5 Cir. 1978), *cert. den.,* 440 U.S. 976 (1979). It is unnecessary for the federal courts to engage in a case by case analysis to determine whether there have been "worse" cases than the Petitioner's where the convicted defendants had not received the death penalty. *Id.,* at p. 604-605. The Georgia Supreme Court as part of its detailed review of Petitioner's case under Ga. Code Ann. § 27-2537 has determined that Petitioner's sentence was not imposed under the influence of passion, prejudice or other arbitrary factors, and has further found the evidence sufficient to support Petitioner's conviction and the aggravating circumstances supporting the death penalty beyond a reasonable doubt. Finally, the Court has also found that Petitioner's death penalty was not disproportionate or excessive to the penalty imposed in other cases. *Coleman v. State, supra.* This Court's independent review of the facts in this case also shows that the statutory aggravating circumstances authorizing Petitioner's death penalty were all fully supported by the evidence beyond a reasonable doubt. As noted previously, the record shows that Petitoner and his co-defendants murdered an entire, defenseless family for no apparent reason. Here, Petitioner's sentence was imposed and the sentence review of the Georgia Supreme Court was accomplished under a constitutional statute which has been approved by the United States Supreme Court. In *Spinkellink,* the Court noted that a state following a properly

drawn statute in imposing the death penalty (as Georgia has done here), conclusively removes any arbitrariness and capriciousness in the application of capital punishment. *Spinkellink v. Wainwright, supra,* at p. 613-614; *also see, Smith v. Balkcom,* 660 F2d 573 (5 Cir. 1981).

Likewise without merit are Petitioner's claims that there are no theoretical justifications for the death penalty. In *Gregg v. Georgia,* 428 U.S. 153 (1976) the United States Supreme Court recognized that the imposition of the death penalty for the crime of murder has been historically accepted under common law. *Gregg v. Georgia, supra,* 428 U.S. at p. 176-177, *citing, McGautha v. California,* 402 U.S. 183 (1971). The court also recognized that the social purposes of retribution, deterrence of capital crimes by prospective offenders, and the incapacitation of dangerous criminals are served by valid, death penalty statutes. *Id.* 420 U.S. at p. 183 and fn. 28. Additionally, Petitioner has not shown any specific acts of discrimination against him, or that the facts and circumstances of his case are so clearly undeserving of capital punishment, that to impose it would be patently unjust and would shock the conscience. *See Spinkellink v. Wainwright,* 578 F2d at p. 606, fn. 28, 614, fn. 40.

In conclusion, this Court finds no merit in Petitioner's grounds nineteen through twenty-two, Sections S, T, U and V of the petition.

Under the twenty-third and twenty-fourth grounds Petitioner asserts that the excusal for cause of prospective jurors who expressed their unyielding opposition to capital punishment deprived Petitioner of a jury composed of a representative cross-section of the community and

created a jury which was biased in favor of the prosecution. These same arguments were considered and rejected in *Spinkellink v. Wainwright, supra,* 578 F2d at p. 593-599, and in *Smith v. Balkcom, supra,* 660 F2d 575-584. Thus, there is no merit to Petitioner's twenty-third and twenty-fourth grounds set out under Sections W and X of the petition.

In conclusion since this Court has determined that Petitioner has had full and adequate hearings in the state courts pertaining to the grounds which he raises here, and since the record before this Court shows that all of the Petitioner's grounds are without merit, and that he has not been denied a fair and impartial trial, this Court concludes that it is not necessary to hold an evidentiary hearing on the issues which have been raised. *Baldwin v. Blackburn,* 653 F2d 942, 946-947 (5 Cir. 1981); *Williams v. Blackburn,* 649 F2d 1019 (5 Cir. 1981); *Brown v. Jernigan,* 622 F2d 914, 916 (5 Cir. 1980); *Blasingame v. Estelle,* 604 F2d 893 (5 Cir. 1979); *Spinkellink v. Wainwright,* supra, 578 F2d at p. 500.

Consistent with the foregoing, Petitioner's prayer for federal habeas corpus relief under 28 U.S.C. § 2254 is hereby denied.

This 10th day of March, 1982.

/s/ J. Robert Elliott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

CIVIL ACTION NO. 81-42-THOM

WAYNE CARL COLEMAN,
Petitioner,

v.

WALTER D. ZANT, WARDEN, GEORGIA
DIAGNOSTIC AND CLASSIFICATION CENTER,
Respondent

ORDER ON PETITIONER'S MOTION TO
REOPEN JUDGMENT

(Filed April 26, 1982)

In the habeas corpus matter above identified the Court has heretofore entered its opinion and order adjudging that the Petitioner's application for habeas corpus relief be denied. The Petitioner has now filed a motion to reopen the judgment of the Court referred to on grounds asserted in the motion. The Respondent has filed his opposition to the Petitioner's motion. The Court has given consideration to the matter and concludes that there appears to be no valid reason why the Court's previous judgment referred to should be reopened. Accordingly, the Petitioner's motion is denied.

IT IS SO ORDERED this 23rd Day of April, 1982.

/s/ J. Robert Elliott
UNITED STATES DISTRICT
JUDGE

Wayne Carl COLEMAN,

Petitioner-Appellant,

v.

Walter D. ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent-Appellee.

No. 82-8310.

United States Court of Appeals, Eleventh Circuit.

June 10, 1983.

The United States District Court for the Middle District of Georgia, J. Robert Elliott, J., denied habeas petition, and petitioner appealed. The Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that: (1) petitioner was entitled to evidentiary hearing on change of venue issue, and (2) petitioner made sufficient showing to warrant evidentiary hearing on whether he was denied effective assistance of counsel and whether special prosecutor's participation in trial deprived him of his constitutional rights.

Remanded with instructions.

Joseph M. Nursey, Millard C. Farmer, Kenneth Rose, Atlanta, Ga., for petitioner-appellant.

Nicholas G. Dumich, Asst. Atty. Gen., Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court For the Middle District of Georgia.

Before JOHNSON and ANDERSON, Circuit Judges, and COLEMAN*, Senior Circuit Judge.

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*Honorable James P. Coleman, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

R. LANIER ANDERSON, III, Circuit Judge:

In this capital case, petitioner Wayne Carl Coleman appeals from the federal district court's order denying his petition for habeas corpus relief. On September 4, 1973, a Seminole County grand jury indicted Coleman, Carl J. Isaacs, George Elder Dungee, and Billy Isaacs on six counts of murder. Some three months later, Billy Isaacs entered a guilty plea to armed robbery and burglary. He was sentenced to a forty-year prison term. In January 1974, Coleman and the two remaining defendants were tried separately, convicted, and sentenced to death by electrocution.[1]

The Supreme Court of Georgia affirmed Coleman's convictions and sentences, and the United States Supreme Court subsequently denied Coleman's petition for writ of certiorari. *Coleman v. State*, 237 Ga. 84, 226 S.E.2d 911 (1976), *cert. denied*, 431 U.S. 909, 97 S.Ct. 1707, 52 L.Ed.2d 394 (1977). Coleman filed a state habeas corpus petition in the Superior Court of Tattnall County. The superior court held hearings on July 27, 1979 and January 25, 1980. On June 13, 1980, the superior court denied Coleman's habeas corpus petition. On October 31, 1980, the Supreme Court of Georgia denied Coleman's application for a certificate of probable cause to appeal. The United States Supreme Court denied Coleman's second petition for writ of certiorari. *Coleman v. Balkcom*, 451 U.S. 949, 101 S.Ct. 2031, 68 L.Ed.2d 334 (1981). At this point, Coleman filed for habeas corpus relief in the United States District

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1. Additional facts are noted in *Coleman v. State*, 237 Ga. 84, 226 S.E.2d 911, 913-14 (1976), *cert. denied*, 431 U.S. 909, 97 S.Ct. 1707, 52 L.Ed.2d 394 (1977).

Court for the Middle District of Georgia. The district court denied the petition. *Coleman v. Zant*, No. 81-42-THOM (M.D.Ga. Mar. 11, 1982). In answer to Coleman's habeas corpus petition, respondent conceded that Coleman had exhausted available state remedies for the issues raised in his petition. Record at 49.

Among the several issues raised on this appeal, petitioner contends that the federal district court erred in denying his request for discovery and an evidentiary hearing on the question of whether pretrial publicity and the community's atmosphere were so prejudicial and inflammatory that the trial court's refusal to grant petitioner's motion for a change of venue deprived him of his constitutional rights.[2] In his petition for habeas corpus, petitioner requested the district court to conduct an evidentiary hearing so that petitioner could prove the facts alleged in the petition. Record at 41. The district court decided that an evidentiary hearing was unnecessary. Record at 239. Petitioner also filed a motion for discovery. Record at 60. In this motion, petitioner indicated that he would use depositions obtained in discovery as direct evidence and as evidence of the need for an evidentiary hearing. The district court did not directly respond to this motion. In its opinion denying habeas relief, the district court said that petitioner had had full and adequate state court hearings relating to the petition's allegations. Record at 239.

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2. Petitioner also requested an evidentiary hearing on two other issues, namely, whether petitioner was denied effective assistance of counsel and whether the special prosecutor's participation in the trial deprived petitioner of his constitutional rights.

We have reviewed the record and it is clear that petitioner is entitled to an evidentiary hearing on the change of venue issue. We therefore remand to the district court for an evidentiary hearing. In the interests of judicial economy and the expeditious handling of this case, we will retain jurisdiction. The district court is instructed to certify its findings and the record of its proceedings on remand to us within 60 days of the issuance of this opinion. *See Spivey v. Zant*, 661 F.2d 464, 478 (5th Cir. 1981) (Unit B), *cert. denied*, — U.S. —, 102 S.Ct. 3495, 73 L.Ed. 2d 1374 (1982); *Harris v. Oliver*, 645 F.2d 327, 331 (5th Cir. 1981) (Unit B), *cert. denied*, 454 U.S. 1109, 102 S.Ct. 687, 70 L.Ed.2d 650 (1981).[3]

I. CHANGE OF VENUE

[1-4] The Fourteenth Amendment's due process clause safeguards a defendant's Sixth Amendment right to be tried by "a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). When prejudicial pretrial publicity or an inflamed community atmosphere preclude seating an impartial jury, due process requires the trial court to grant a defendant's motion for a change of venue, *Rideau v. Louisiana*, 373 U.S. 723, 726, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663 (1963), or a continuance, *Sheppard v. Maxwell*, 384

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3. In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982), this court adopted as binding precedent all of the post-September 30, 1981, decisions of Unit B of the former Fifth Circuit. *Id.* at 34. *Cf. Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209.

U.S. 333, 362-63, 86 S.Ct. 1507, 1522-23, 16 L.Ed.2d 600 (1966). Ultimately, the question is whether a defendant's "trial was not fundamentally fair." *Murphy v. Florida*, 421 U.S. 794, 799, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975). Two standards guide analysis of this question. They are the "actual prejudice" standard and the "presumed prejudice" standard.

[5] To find the existence of actual prejudice, two basic prerequisites must be satisfied. First, it must be shown that one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty. *Irvin v. Dowd*, 366 U.S. at 727, 81 S.Ct. at 1645. Second, these jurors, it must be determined, could not have laid aside these performed opinions and "render[ed] a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. at 723, 81 S.Ct. at 1643.

[6, 7] Prejudice is presumed from pretrial publicity when (1) pretrial publicity is sufficiently prejudicial and inflammatory, and (2) the prejudicial pretrial publicity saturated the community where the trials were held. *Rideau v. Louisiana*, 373 U.S. at 726-27, 83 S.Ct. at 1419-20; *Murphy v. Florida*, 421 U.S. at 798-99, 95 S.Ct. at 2035-36; *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir.1980), *cert. denied*, 451 U.S. 913, 101 S.Ct. 1986, 68 L.Ed.2d 303 (1981); *see also Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965). As the Fifth Circuit has described the test, "where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render

virtually impossible a fair trial by an impartial jury drawn from that community, '[jury] prejudice is presumed and there is no further duty to establish bias.'" *Mayola v. Alabama*, 623 F.2d at 997 (quoting in part from *United States v. Capo*, 595 F.2d 1086, 1090 (1979), *cert. denied*, 444 U.S. 1012, 100 S.Ct. 660, 62 L.Ed.2d 641 (1980)).

[8, 9] Petitioner has the burden to show "essential unfairness," *Beck v. Washington*, 369 U.S. 541, 558, 82 S.Ct. 955, 964, 8 L.Ed.2d 98 (1962) (quoting *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462, 76 S.Ct. 965, 970, 100 L.Ed. 1331 (1956)), under either standard. The petitioner must "show that setting of the trial was inherently prejudicial or that the jury selection process of which he complains permits an inference of actual prejudice." *Murphy v. Florida*, 421 U.S. at 803, 95 S.Ct. at 2038. Given petitioner's allegations of "grave constitutional errors," *Townsend v. Sain*, 372 U.S. 293, 319, 83 S.Ct. 745, 760, 9 L.Ed.2d 770 (1963), regarding the trial court's denial of the motion to change venue, and given the fact that petitioner shoulders the burden to demonstrate these allegations, it cannot be doubted that petitioner is entitled to a full and fair opportunity to develop the facts material to this constitutional claim. We must determine whether or not the petitioner has had that opportunity and whether petitioner has made "an appropriate showing," *Harris v. Nelson*, 394 U.S. 286, 291, 89 S.Ct. 1082, 1086, 22 L.Ed.2d 281 (1969), for a federal evidentiary hearing.

II. THE NEED FOR AN EVIDENTIARY HEARING

[10] *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), prescribes the standards governing the question whether the federal district court must hold

an evidentiary hearing in determining the merits of a habeas corpus petition of a person in state custody.[4] *Townsend* delineated six particularized circumstances which warrant an evidentiary hearing.[5] The fifth circumstance occurs when "the material facts were not adequately developed at the state court hearing." 372 U.S. at 313, 83 S.Ct. at 757.[6] To require the district court to hold an evidentiary hearing based on this fifth circumstance, petitioner must make a showing of two elements:

> [F]irst, that a fact pertaining to his federal constitutional claim was not adequately developed at the state court hearing and that the fact was "material" (in the language of section (d)(3)) or "crucial to a fair,

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4. The habeas corpus statute, 28 U.S.C.A. § 2254(d) (West 1977), "allocates the burdens of proof once a *Townsend* hearing is deemed necessary." *Thomas v. Zant*, 697 F.2d 977, 984 (11th Cir.1983); *In re Wainwright*, 678 F.2d 951, 953 (11th Cir. 1982); *Guice v. Fortenberry*, 661 F.2d 496, 501 (5th Cir.1981) (en banc).

5. *Townsend's* particularized holding stated:

> [A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313, 83 S.Ct. at 757.

6. This circumstance has been codified in the habeas corpus statute. There it serves to rebut the presumption that state factual findings are correct. *See* 28 U.S.C.A. § 2254(d)(3) (West 1977).

> rounded development of the material facts" (in the language of *Townsend*); second, that failure to develop that material fact at the state proceeding was not attributable to petitioner's inexcusable neglect or deliberate bypass.

Thomas v. Zant, 697 F.2d 977, 986 (11th Cir.1983) (footnote omitted); *see Townsend v. Sain,* 372 U.S. at 317, 83 S.Ct. at 759.

[11] Petitioner has made the requisite showing of the first element of the *Townsend* standard. There are material facts which have not been adequately developed in the state court proceedings. Facts, or issues of fact, "refer to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators . . . .'" *Townsend v. Sain,* 372 U.S. at 309 n. 6, 83 S.Ct. at 755 n. 6 (quoting *Brown v. Allen,* 344 U.S. 443, 506, 73 S.Ct. 397, 445, 97 L. Ed. 469 (1953) (opinion of Frankfurter, J.)); *see Hance v. Zant,* 696 F.2d 940, 946-47 (11th Cir.1983). The primary facts regarding petitioner's presumed prejudice claim concern the nature and scope of pretrial publicity and its effect on the community where petitioner was tried. As the record now stands, it is impossible to determine what kind of coverage emanated from local television and radio programs to which Seminole County residents were exposed. Because the record does not reveal the content of and audience for these radio and television programs, it is

impossible to resolve the question whether prejudicial pretrial publicity saturated the community.[7]

Despite the absence of any factual development on television/radio news accounts, respondent argues that the facts relevant to the change of venue issue have been adequately developed. In support of this argumnt, respondent points to the pretrial hearings on the motion for a change of venue, the state habeas corpus hearings, and the voir dire transcript.

We have examined the transcripts of the state proceedings. Neither the pretrial hearings nor the state habeas hearings developed a well-rounded description of the nature of television/radio news accounts (whether prejudicial or not) and the audience for these programs in Seminole County. The pretrial hearings on the motion for a change of venue do not contain any evidence of the television and radio news programs about the case. The state habeas hearings contain two statements on this issue. The state editor of the Albany Herald testified that "the electronic media played . . . [the case] very high." Record, Exhibit No. 10, vol. I, at 164 [hereinafter cited as State Habeas Hearings]. Petitioner's trial counsel also testified that there was extensive radio and television coverage. *Id.* at 94. With these two conclusory statements standing alone, the state of this record does not provide an adequate

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7. Our discussion of television and radio news programs and the presumed prejudice standard is illustrative only. Such evidence might relate not only to presumed prejudice, but also to actual prejudice. Our discussion should not be taken to exclude other evidence petitioner may seek to produce on remand at a hearing on the merits of the change of venue issue.

basis to review petitioner's presumed prejudice claim, especially in light of the special concern about the impact of television coverage evidenced by the Supreme Court in *Rideau v. Louisiana*, 373 U.S. 723, 726, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663 (1963).[8]

[12] This leaves respondent's contention that the voir dire transcript adequately developed the facts material to petitioner's presumed prejudice claim. In the context of petitioner's presumed prejudice claim, respondent's argument places too much weight on the voir dire transcript. While the voir dire is useful as evidence to determine whether prejudice should be presumed, *see Murphy v. Florida*, 421 U.S. 794, 799-803, 95 S.Ct. 2031, 2035-2037, 44 L.Ed.2d 589 (1975); *Calley v. Callaway*, 519 F.2d 184, 208-09 (5th Cir.1975), *cert. denied*, 425 U.S. 911,

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8. *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), is the only Supreme Court decision in which prejudice was presumed from pretrial publicity and no other outside influences. In *Rideau*, the defendant confessed to several crimes committed in a Louisiana parish. This confession was video-taped, broadcast three times by a local television station, and seen by 24,000, 52,000, and 29,000 people in the community. 373 U.S. at 724, 83 S.Ct. at 1418. At the time of the trial, the parish had a population of 150,000. 373 U.S. at 724, 83 S.Ct. at 1418. Reviewing defendant's conviction, the Supreme Court held that the trial court's denial of defendant's motion for a change of venue violated the due process clause. The *Rideau* Court stated:

> For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.

373 U.S. at 726, 83 S.Ct. at 1419 (emphasis in original).

96 S.Ct. 1505, 47 L.Ed.2d 760 (1976), the trial voir dire in this case is not conclusive evidence of the absence of prejudice. In *Rideau v. Louisiana*, the Court noted that three jurors who decided the case (the defendant was convicted and sentenced to death) had seen the televised confession, 373 U.S. at 725, 83 S.Ct. at 1418-19, but the Court was willing to presume prejudice "without pausing to examine a particularized transcript of the voir dire examination of the members of the jury." 373 U.S. at 727, 83 S.Ct. at 1419-20. It would be exceedingly difficult for us to consider *Rideau's* application to the instant case by relying on the voir dire transcript in the absence of a well-rounded description of the local television and radio coverage.

Petitioner's motion for discovery in the district court illustrates some sources of facts relevant to this constitutional claim of presumed prejudice. Petitioner sought transcripts of television and radio broadcasts which referred to the case. Petitioner sought to depose the news directors of television stations, radio stations, and newspapers in and around Seminole County.[9] Petitioner also

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9. In the companion case of *Isaacs v. Zant*, No. 82-8017, the district court permitted expansion of the record, including numerous depositions of news media personnel. We anticipate that the district court will order that the instant record be supplemented to include the relevant *Isaacs* depositions. Although this petitioner was not a party to those proceedings, and is not bound by the conduct thereof, in demonstrating "good cause," Rule 6, Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254 (West 1977), for further discovery or depositions of news media personnel, it is reasonable to use the *Isaacs* depositions as the starting point. For example, petitioner might properly be required to show "good cause" to justify any further deposition of a person previously deposed

(Continued on following page)

sought to depose other persons whom he claimed had knowledge of the prejudice against petitioner existent in Seminole County during his trial. At the most basic level, the facts that could be derived from these sources are unquestionably material to petitioner's claim on the change of venue issue. These facts would be crucial in determining the degree to which the publicity was prejudicial and the saturation thereof. The content of and audience for television/radio media's coverage are indeed "indispensable to a fair, rounded, development of the material facts." *Townsend v. Sain*, 372 U.S. at 322, 83 S.Ct. at 762. Petitioner has made the requisite showing of the first element of the *Townsend* standard.

[13] Having decided that there are material facts which have not been adequately developed heretofore, we must now determine whether petitioner has demonstrated that the failure to develop these facts was not attributable to petitioner's inexcusable neglect or deliberate bypass. The standard of inexcusable neglect set down in *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), was applied in *Townsend v. Sain*, 372 U.S. at 317, 83 S.Ct. at 759, and this standard applies in evaluating the need for a federal evidentiary hearing. *Thomas v. Zant*, 697 F.2d

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(Continued from previous page)

in *Isaacs*. On the other hand, the *Isaacs* depositions fall short of providing a well-rounded description of the local television and radio coverage, and petitioner is clearly entitled to attempt to supplement same. For example, the *Isaacs* record inexplicably failed to include the Georgia Network wire service broadcasts during the relevant time, despite the fact that the tapes thereof were discovered during the deposition of Donald C. Kennedy. Similarly, documents from the AP wire service and UPI wire service were apparently available, deposition of Donald C. Kennedy, at 19-20, but were inexplicably not made part of the record.

977, 981-89 (11th Cir.1983); *Guice v. Fortenberry*, 661 F.2d 496, 506-07 & 507 n. 25.[10]

[14] We conclude that petitioner has also made a sufficient showing on the inexcusable neglect-deliberate bypass element. Despite affirmative efforts, petitioner was unable, through no fault of his own, to bring live witnesses to the state habeas hearing. At the time of that hearing, Ga. Code Ann. § 38-801(e) limited the state habeas court's subpoena power by providing that a subpoena for attendance at a hearing or trial could be served only with-

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10. In *Townsend*, the defendant contested the admissibility of his confession, which he claimed had been illegally coerced by an injection of hyoscine. At the state court proceedings, medical experts inexplicably failed to testify as to the material facts concerning hyoscine, specifically whether it was a truth serum capable of inducing "involuntary" statements. 372 U.S. at 321-22, 83 S.Ct. at 761-62. The Supreme Court concluded that "the medical experts' failure to testify fully cannot realistically be regarded as Townsend's inexcusable default." 372 U.S. at 322, 83 S.Ct. at 762.

In *Guice v. Fortenberry*, the Court required an evidentiary hearing and decided that the failure to develop the material facts was not attributable to defendants' inexcusable neglect. The defendants claimed that blacks were systematically excluded from service as grand jury foremen. The record from state court proceedings did not disclose the number of grand jury foremen selected during the relevant period of time, and this fact was deemed material. The en banc court decided that there was no inexcusable neglect for three reasons. First, the record did not explain the defendants' neglect to develop the facts. Second, there was no credible allegation that the defendants left the evidence undeveloped for tactical reasons. Third, it appeared as if the defendants and their attorneys simply did not appreciate the relevance of the missing facts. 661 F.2d at 507.

See Thomas v. Zant, 697 F.2d at 981-86, for a full discussion of the inexcusable neglect-deliberate bypass standard.

in 150 miles of the hearing or trial situs.[11] The habeas judge rejected petitioner's constitutional attack on that statute. Record on Appeal, at 251-53. Since material witnesses resided more than 150 miles from the location of the state habeas hearing,[12] and since many of these witnesses were hostile and unwilling to testify voluntarily, State Habeas Hearings, vol. I, at 18; *id.*, vol. II, at 22-23, it is clear that petitioner was unable to bring live witnesses to the state habeas hearing. Petitioner was also effectively precluded from obtaining the testimony of such witnesses by oral deposition, because petitioner was indigent and the state habeas court declined to provide funds which would have been necessary to pay a court reporter or stenographer to transcribe such depositions. State Habeas Hearings, vol. I, at 29 & 34-35; *id.*, vol. II, at 22. Although petitioner apparently could have compelled witnesses to answer written interrogatories or to file sworn affidavits,[13] respondent has not argued either in brief or at oral argument that petitioner's failure to pursue such alternatives, or that any other acts or omissions, constituted inexcusable neglect or deliberate bypass. Moreover, it is uncertain at best whether such methods would have been effective to elicit from hostile witnesses the subtle and complex facts relative to the degree of prejudice in the community at the time of the trial. Under the particular

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11. In 1980, the Georgia state legislature repealed the 150-mile limitation and provided for statewide service of subpoenas. *See* Ga.Code Ann. § 24-10-21 (West 1982).

12. Donalsonville, Georgia, the location of the trial is well over 150 miles from Reidsville, Georgia, the location of the state habeas hearing.

13. Ga.Code Ann. §§ 38-2401, 38-2402 (1980).

circumstances of this case, the failure to adduce the missing material facts "cannot realistically be regarded as . . . [petitioner's] inexcusable default." *Townsend v. Sain*, 372 U.S. at 322, 83 S.Ct. at 762.

Having satisfied both elements of the *Townsend* standard, petitioner is entitled to an evidentiary hearing on the change of venue issue.

[15] The most serious issue raised by petitioner is the change of venue issue above discussed. However, petitioner also requested the district court to conduct an evidentiary hearing on two other issues, namely, whether petitioner was denied effective assistance of counsel and whether the special prosecutor's participation in the trial deprived petitioner of his constitutional rights. Although petitioner's entitlement to an evidentiary hearing on these two issues is not as clear as it is with respect to the change of venue issue, the showing is sufficient and we direct that the parties be permitted, if they desire, to present evidence at the evidentiary hearing on these two issues also. This panel will retain jurisdiction of this case, and upon certification to us of the findings and record on remand, will decide all the issues in this case.[14]

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14. In addition to the issues involving change of venue, effective assistance of counsel, and the special prosecutor's participation, the petitioner has raised three other issues: (1) whether the Constitution required the state trial judge's disqualification because he was the special prosecutor's uncle; (2) whether the trial court's jury instructions impermissibly shifted the burden of proof on intent and malice from the state to the defendant in violation of the Fourteenth Amendment's due process clause; and (3) whether the trial court's sentencing instructions adequately informed the jury as to its duty to consider mitigating circumstances.

For the reasons stated, we retain jurisdiction and remand for an evidentiary hearing.[15] The district court shall certify its findings and the record of its proceedings on remand to us within 60 days of the issuance of this opinion.

REMANDED WITH INSTRUCTIONS.

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15. Petitioner is "entitled to careful consideration and plenary processing" of his claims "including full opportunity for presentation of the relevant facts." *Harris v. Nelson*, 394 U.S. 286, 298, 89 S.Ct. 1082, 1090, 22 L.Ed.2d 281 (1969). In view of the "demand for speed, flexibility, and simplicity," *Hensley v. Municipal Court*, 411 U.S. 345, 350, 93 S.Ct. 1571, 1574, 36 L.Ed.2d 294 (1973), petitioner shall proceed promptly to expedite the hearing and submit a prompt request for discovery if desired.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

CIVIL ACTION NO. 81-42-THOM

WAYNE CARL COLEMAN,

Petitioner,

v.

WALTER D. ZANT, WARDEN,
Georgia Diagnostic and
Classification Center,

Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO REMAND

(Filed March 18, 1985)

On May 15, 1973 four men entered the Alday residence in a rural county in southwest Georgia for the purpose of burglary. Two members of the Alday family came home and were shot to death with hand guns. One of them was shot seven times in the head, the other four times in the head. Later a brother arrived. He was killed with a hand gun. Then the wife of one of the earlier victims arrived. She was shot. Two other family members then came home and both of them were killed. The wife was then raped by two (or more) of the men, bound and blindfolded, driven to a wooded area and raped again, beaten and mutilated. She was then killed with two shots. Her watch was removed from her nude body.

The Petitioner above named was one of the four men. He was brought to trial in January, 1974, and was convicted on six counts of murder. Although more than eleven years have passed since his conviction, he has not yet been punished.

In *Furman v. Georgia,* 408 U.S. 238 (1972), Justice Potter Stewart said:

> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law."
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> p. 308.

Columnists and commentators who with increasing frequency are discussing the reasons for the growing public criticism of the courts might feel that they would be justified in using the history of this case as "Exhibit A". Although the evidence of the guilt of the Petitioner was overwhelming, lawyers who did not represent him at trial, while knowing that a "perfect trial" is hardly ever possible, have nevertheless equated a "fair trial" with a perfect trial and have for more than eleven years filed numerous appeals and petitions seeking the reversal of the conviction or a modification of the sentence imposed and these efforts have led the attention of the state courts and the federal courts at all levels. This is the second time this Court has been called upon to review this matter. On the first occasion this Court denied the relief sought. This Court's order was the subject of an appeal to the United States Court of Appeals for the Eleventh Circuit, one of the grounds for appeal being the contention that the Defendant had not been given ample opportunity to develop evidence which would demonstrate that he had not had a fair trial because of prejudicial pretrial publicity, in

other words, that he was simply the victim of a "bad press". The Court of Appeals remanded the case to this Court with direction that the Defendant be given an opportunity to develop the evidence on this issue.

In compliance with the remand order referred to, this Court has allowed extensive discovery in this case on the issue of alleged pretrial publicity, including the submission of evidence in the form of depositions, documentary evidence, affidavits and live testimony, culminating in a final evidentiary hearing consuming some four days.[1]

Considering the passage of so much time since the events which are the subject of this inquiry, it is not surprising that counsel for the parties and the Court have experienced some difficulty in obtaining a well-rounded description of the nature of the newspaper, television and radio coverage. Counsel for Petitioner has obtained some newspaper articles not previously submitted in this case, has substituted copies of articles already received into evidence and has sought out various media sources which might provide information on the coverage given in Seminole County, which is the scene of the events referred to.

The Court does not deem it necessary to list the identities of all of the witnesses who appeared nor identify with particularity all of the documentary evidence which was produced, but the Court does state that testi-

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[1] Additionally, as contemplated by the remand order, this Court has received evidence relating to the contention of the Petitioner that the special prosecutor's participation during Petitioner's trial deprived Petitioner of his constitutional rights. No additional evidence was presented concerning the issue of alleged ineffective assistance of counsel.

mony presented and the documentary evidence which was produced have been reviewed in their entirety and serve as the basis for the findings of fact herein made.

In considering the evidence offered on the issue of alleged prejudicial pretrial publicity this Court has been guided by the comments made by the Court of Appeals in the remand order on the appropriate standards to be followed in reviewing such a claim, including the standards set forth in *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Murphy v. Florida*, 421 U.S. 794, 799 (1975); and *Mayola v. Alabama*, 623 F2d 992 (5 Cir. 1980), *cert. denied*, 451 U.S. 913 (1981). Additionally, this Court examined this allegation of alleged prejudicial pretrial publicity in light of the decision of the Court of Appeals for the Fifth Circuit in *Calley v. Callaway*, 519 F2d 184 (1975), and in light of the recent decision of the Supreme Court of the United States in *Patton v. Yount*, — U.S. — , 104 S.Ct. 2885 (1984). In light of these cases and the instruction of the Court of Appeals in its remand order, Petitioner has now had a full and fair opportunity to develop the facts material to this constitutional claim.

As has heretofore been noted in earlier orders of this Court in this case, a hearing was held in the Superior Court of Seminole County, Georgia, concerning Petitioner's motion for change of venue on September 27 and October 9, 1973. The hearing on the motion was consolidated with the motions of coindictees George Dungee and Carl J. Isaacs. The Superior Court denied the motions for change of venue on October 9, 1973. Following Petitioner's trial and conviction Petitioner Coleman

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and his coindictees pursued separate appeals to the Supreme Court of Georgia in which they alleged as one of their enumerations of error that the Superior Court erred when it denied their motions for change of venue. In Coleman's appeal to the Supreme Court of Georgia that Court extensively reviewed the issue of whether or not a change of venue should have been granted and concluded that the Superior Court of Seminole County did not abuse its discretion or violate due process in denying a change of venue. See *Coleman v. State,* 237 Ga. 84, 226 S.E.2d 911 (1976).

In addition to developing the issue of alleged prejudicial pretrial publicity by means of a motion for change of venue filed prior to trial, Petitioner also raised this issue in his state habeas corpus petition filed in the Superior Court of Tattnall County, *Coleman v. Balkcom,* Civil Action No. 79-61. The court adhered to the finding of the Georgia Supreme Court on direct appeal that, "under this evidence no other verdict could have reasonably been returned by a jury *regardless of the locale of the trial*". *Coleman v. State, supra,* at 93 [emphasis added], cited in the judgment of the Superior Court of Tattnall County in *Coleman v. Balkcom,* Civil Action No. 79-61, order dated June 13, 1980.

The evidence before the trial court on the motion for change of venue as well as the decision of the Supreme Court of Georgia assumes even more importance in this Court's determination in light of the holding in *Patton v. Yount, supra,* that the presumption of correctness is applicable to a determination that a juror can be impartial. The Supreme Court of Georgia reviewed the voir dire transcript and found that, " . . . we cannot conclude that

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the trial court abused its discretion in overruling the motion for a change of venue. During the voir dire examination there was no showing that the jurors summoned to try the appellant's case had formed such a fixed opinion as to either the guilt or the innocence of the appellant based on news media accounts of the homicides". *Coleman v. State, supra,* at p. 90. *See also Coleman v. State, supra,* at p. 88-89.

Reviewing the voir dire examination in light of the expanded record now before this Court, this Court again concludes that although it is clear that there was widespread knowledge of the fact that there had been a murder of six members of the Alday family in the Seminole County community, Petitioner has failed to show that he was denied his right to a fair trial by a panel of impartial jurors in light of the tests set forth in *Irvin v. Dowd, supra,* i.e., whether jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court. *Irvin v. Dowd, supra,* at 722-723. The often quoted portion of the decision of the Supreme Court in *Irvin v. Dowd, supra,* states that it is not required under this standard that jurors be totally ignorant of the facts and issues involved and also notes that scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. *Id.* at 722-723.

In the circumstances here presented the decision of the Court of Appeals for the Fifth Circuit in *Calley v. Callaway,* 519 F2d 184 (1975), is quite instructive. Lt. Calley was convicted of participation in the so-called "My Lai massacre" and he later sought habeas corpus relief based on the same contention now made by the Pe-

titioner in this case, i.e., that massive and intense pretrial publicity had made it impossible for him to obtain a fair trial. After full evidentiary hearing the District Court concluded that Calley had been persecuted and pilloried by the news media so intent in making prejudicial relevations about the My Lai incident that Calley's right to a fair and unbiased hearing was impossible at the time the trial was conducted. The Court's review led it to conclude that the publicity was clearly improper, largely biased and undoubtedly prejudicial. It was the Court's finding that it was not humanly possible for the jurors not to be improperly influenced by prior exposure and that no person, however honest minded he might try to be, could avoid the lasting emotional impact of some of the publicity, and that with all the publicity given the incident and Calley's alleged involvement, it would be sheer fantasy to believe that the jurors did not see, hear and read the publicity or that they were not influenced by it. These findings led the District Court to hold the publicity inherently prejudicial to Calley's Sixth Amendment rights. *Calley v. Callaway,* 382 F. Supp. 650 (M.D. Ga. 1974).

Citing *Irvin v. Dowd*, the Court of Appeals for the Fifth Circuit reversed the District Court, and in doing so stated:

> "The district court emphasized that the case involved 'massive' and 'intense' publicity. Yet this court has noted previously that '[w]e cannot accept the position that "prominence brings prejudice." *Hale v. United States, supra,* 435 F.2d at 747. Moreover, no court has held that the only impartial juror is an uninformed one. We cannot expect jurors to live in isolation from the events and news of concern to the community in which they live.

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.
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> *Irvin v. Dowd, supra,* 366 U.S. at 722-723, 81 S.Ct. at 1642-1643."

The contentions made by Coleman in this case exactly parallel the contentions made by Calley in his case and the pretrial publicity in the Calley case was far more massive and opinionated than the pretrial publicity in this case. So, we are led ineluctably to conclude that the Petitioner in this case cannot prevail on his contention that he was denied a fair trial because of prejudicial pretrial publicity.

Therefore, this Court certifies as a conclusion of law that it reaffirms that portion of its opinion in this case dated March 11, 1982 in which this Court found that Petitioner Coleman had failed to establish "actual prejudice", as that standard has been interpreted and applied. This Court stresses that not only was the voir dire proceeding reviewed once again in making this determination, but that the expanded record before the Court on remand was con-

sidered in determining whether the standards of *Irvin v. Dowd, supra,* had been violated. This allegation deserves no further treatment here, as the decision of the Supreme Court of Georgia and earlier opinions of this Court discuss the voir dire proceedings. Further reference to the record before this Court is not necessary in order to squarely certify this Finding of Fact and Conclusion of Law to the Court of Appeals for the Eleventh Circuit.

In making the determination of no "actual prejudice", the Court not only considered the applicable federal principles involved, but also considered the requirement of Georgia law, as contained in former Ga. Code Ann. § 27-1201; O.C.G.A. § 17-7-150, which requires that there should be a change of venue in a criminal case where either one of two situations exist, i.e., where an impartial jury cannot be obtained, or where there is a probability of danger or violence. This Court determines that Petitioner has failed to show that an impartial jury could not be obtained under the "actual prejudice" standard, and now turns to whether or not Petitioner Coleman should prevail under an application of the "presumed prejudice standard", or under that provision of Georgia law which requires a change of venue based on a probability of danger or violence.

It is appropriate to recall at this point that evidence introduced before the trial court on the original motion for change of venue filed on behalf of Petitioner and his coindictees is now also before this Court, and this evidence includes fourteen issues of the *Donalsonville News*, the local newspaper; 28 articles from the *Albany Herald*, 24 issues of the *Dothan Eagle;* and 3 magazine articles,

all carrying stories from the discovery of the crime on May 15, 1973, through the pretrial hearing on the motions for change of venue. It should also be noted that this Court is aware that counsel for Petitioner Coleman renewed his motion for change of venue prior to Petitioner Coleman's trial, as Petitioner Coleman was the last of the three coindictees who were tried in the Superior Court of Seminole County, but this supplemented motion for change of venue was denied by the trial court.

Turning to an analysis of the evidence before this Court under a "presumed prejudice" standard, we note that Petitioner Coleman's assertion that he was denied his constitutional rights due to alleged prejudicial pretrial publicity appears to center around the allegation that due to the nature of the crimes, the nature of the community, the nature of the victims, the volume of pretrial publicity from various media sources, and the content of this pretrial publicity, prejudice to the Petitioner Coleman should be presumed, even absent a showing of actual prejudice by reference to the panel of jurors selected to try Petitioner Coleman. It also appears that an additional basis for Petitioner Coleman's contention concerning alleged prejudicial pretrial publicity is that since he was tried as the last of the three coindictees he suffered additional prejudice from publicity prior to his trial concerning the two previous trials.

The "presumptive prejudice" standard was promulgated by the Supreme Court in *Rideau v. Louisiana*, 373 U.S. 723 (1963), and the test was recently reiterated in *Mayola v. Alabama*, 623 F2d 992 (5 Cir. 1980).

Expert witnesses presented at the final evidentiary hearing provided relevant evidence concerning the char-

acteristics of the community and a summarization of the sources and types of media coverage given to the murders, and the available evidence at this time concerning publicity about the murders during the relevant time period. Citizens of Seminole County and reporters who were familiar with this part of the state also provided the Court with information about the nature of the community, all of which was considered by the Court in determining whether or not prejudice should be presumed.

However, the Court declines in this order, as it did during the final evidentiary hearing in this matter, to consider the offer of proof made with regard to Petitioner's expert witnesses as to the conclusions that they would draw about the nature of the publicity concerning the Alday murders, i.e., whether the publicity was "inflammatory, "prejudicial", or whether the publicity evidenced a "huge . . . wave of public passion". *See Patton v. Yount, supra.* The Court deems these matters to be factual conclusions that must be made by this Court, in light of the applicable case law, in determining whether Petitioner Coleman has been denied his right to a fundamentally fair trial.

From the evidence presented, in its many forms as above described, the Court makes the following Findings of Fact:

There was widespread knowledge among the citizens of Seminole County of the fact that six members of the Alday family, a well-known family in the Seminole County community, had been murdered. It appears from the evidence received from citizens, reporters and expert witnesses, that much of the knowledge about the crimes in this

small, rural community may have resulted from word-of-mouth communication. Additionally, the evidence reveals the following *primary* media sources in Seminole County at the time the crimes were commited: (1) the *Donalsonville News,* a weekly newspaper published in the county seat of Seminole County every Thursday; (2) the *Albany Herald,* published in nearby Albany, Georgia (approximately 40 miles from Donalsonville, Georgia); (3) the *Bainbridge Post-Searchlight,* a newspaper published in nearby Bainbridge, Georgia; (4) the *Dothan Eagle,* a newspaper published in nearby Dothan, Alabama; (5) the *Atlanta Journal/Constitution* (to a limited extent, as reflected in evidence before the Court); (6) WSEM, the local radio station in Donalsonville, Georgia; (7) television stations in Albany, Georgia; Tallahassee, Florida; and Dothan, Alabama; (8) radio stations in Albany, Georgia, and Bainbridge, Georgia, which could be received to some extent in Seminole County, Georgia; (9) the Georgia Network News, a service apparently utilized during the relevant time period by only one radio station received in Seminole County, Georgia; and (10) reports from Associated Press and United Press International, which may have been utilized by some of the above named radio stations and television stations, as well as by some of the newspapers printing stories concerning the murders.

As revealed by testimony and an examination of the publicity from the various news sources cited above, the initial reaction of Seminole County citizens appeared to be one of "shock" that these murders had occurred in their community. There was also fear among citizens of the County that members of the community might be in

danger of having similar acts committed against them, as initially no suspect or suspects in the murders were identified and it was believed that whoever committed the murders might still be in the community. It appears that much of the publicity concerning the murders centered around the initial discovery of the bodies of five of the victims, the search for the body of the sixth victim, Mary Alday, and the attempt to identify a suspect or suspects in the murders with reference to the evidence found at the scene of the crime. Once the four suspects were identified, much of the publicity centered around the search for and apprehension of the suspects in West Virginia and the return of these suspects to Georgia and their subsequent arraignment on these charges.

It is obvious that the amount of publicity substantially subsided in the interval between the arraignment of the Petitioner and his three coindictees and the trial of the first of the four accused men, Carl J. Isaacs. During this interval the considerably diminished newspaper coverage concerning the crimes dealt with the progress of the legal proceedings, including the appointment of counsel for the suspects, the withdrawal of certain attorneys for certain of the defendants and the subequent appointment of new counsel and the filing of various motions on behalf of the four defendants. The Court specifically notes in this regard that several of the reporters who covered the crimes testified that they left Seminole County after the suspects had been arraigned and did not return until the beginning of the trial of Carl Isaacs.

It clearly appears that this marked decrease in publicity resulted in an attenuated "cooling off period" dur-

ing which the tension felt in the community immediately following the crimes and especially prior to the capture of the suspects decreased. This decrease in tension was similar to the decrease in community tension which was found to have existed between the first trial and second trial of the defendant in *Patton v. Yount, supra.* In this case eight months elapsed between the date the crime was committed and the date on which Coleman was brought to trial, and in cases dealing with claims of prejudicial pretrial publicity such a time lapse has been regarded as being a matter of significance. In *Wansley v. Slayton,* 487 F2d 90, 93-94 (4 Cir. 1973), *cert. denied* 416 U.S. 994 (1974), the court stated that "recency is a critical factor to be considered in connection with any claim of pretrial prejudicial publicity". In the case of *Calley, supra,* the Court of Appeals took particular note of the fact that several months had elapsed between the time when the pretrial publicity occurred and the time when Calley was brought to trial and the Court stated: "Where there has been a substantial lapse of time between the publicity and the trial, there is a far lesser likelihood the publicity will affect the jurors' deliberations." This same principle was recognized in *United States, ex rel. Rosenberg v. Mancusi,* 445 F2d 613 (2 Cir. 1971), *cert. denied* 405 U.S. 956 (1972) (eight months between crime and trial); and in *United States v. Bowe,* 360 F2d 1 (2 Cir. 1966), *cert. denied* 385 U.S. 961 (adverse publicity appeared "several months" prior to trial); and *Beck v. Washington,* 369 U.S. 541 (1962) (nine and one-half months sufficient time for impact of prejudicial publicity to subside).

This finding of the decline in community feeling above referred to is not an inference made by the Court, but is

supported by the evidence presented. For example, although mob or community violence was stated to be anticipated by certain members of the law enforcement community immediately after the crimes occurred and certain portions of the publicity which the Court now has before it indicate a high level of emotion in members of the community, no actual threats or violence ever materialized in Seminole County against Petitioner Coleman or any of his coindictees and, in fact, some of the newspaper articles and other forms of publicity urged community restraint and aided the subsidization of community emotion.

By way of example, the Court notes the editorial column entitled "Out on a Limb" by Bo McLeod in the *Donalsonville News*, published Thursday, May 24, 1973. This article contained the following language and is considered by the Court as indicative of community sentiment in Seminole County during the relevant time period:

> Yes, the four men suspected and accused of the murder of the six Aldays can get a fair trial in Seminole County. . . . The people of this community are capable of cooperating with and respecting the various steps toward their trial. They are very angry about what happened. . . . There is a wide difference in the question of whether the people here could give the suspects a fair trial, and in our wanting to see guilty ones punished and removed from being able to commit the same outrages again, a few years from now, on other innocent people.
>
> But our people want to be sure that the suspects now being held in jail are the ones who committed the crimes. We don't want to see four innocent men punished. . . . We're innocent of bias and prejudice, until you prove us guilty. . . . Few screwballs among us who get a thrill out of talking dumb and sounding off about what all they'd like to do to the four men, . . . but

> they're in the extreme minority, and they are pretty well known for their lack of sense.
>
> Bud Alday spoke the sentiments of his family when he said they didn't want to see anybody else get hurt in this terrible tragedy that came our way, "enough people have been hurt already," he said. . . . The only thing that any kind of mob action, or inciting troublesome thoughts can bring is more sorrow. . . . The law must be obeyed.

The Court considers this statement on the editorial page of the local newspaper to be indicative of the sentiments of the community, i.e., that the citizens of the community certainly wanted to see the persons responsible for the crimes punished, not that they wanted to see Petitioner Coleman or his coindictees punished if they were not responsible.

Based on the foregoing Findings of Fact the Court concludes that the volume of publicity in and of itself has not established the requisite prejudice, as will be discussed more fully in the Conclusions of Law to be made at the end of this order. The Court will now state its Findings of Fact relative to the nature of the publicity given to the crimes.

In *Patton v. Yount, supra,* the Court noted that during the voir dire proceedings the newspaper published articles on almost a daily basis, but that the articles were "purely factual articles". Similarly, in reviewing the nature of the publicity disseminated about the crimes in this case this Court finds that most of the articles and reports were straightforward factual reports about the crucial events in the proceedings then taking place, whether that was the discovery of the five bodies, the search for the body of Mary Alday, the funeral of the victims, the iden-

tification and capture of the suspects, the return of the suspects to Georgia, the suspects' arraignment, the indictment by the grand jury, the appointment of counsel, the filing of pretrial motions, hearings on the pretrial motions, or the anticipation of the beginning of trial and the selection of potential jurors.

This Court finds as did the Court in *Patton v. Yount, supra,* that many of the newspaper accounts in the *Donalsonville News,* the *Albany Herald,* the *Bainbridge Post-Searchlight* and the *Dothan Eagle,* as well as in the transcript of the broadcasts of the Georgia Network News were announcements of trial dates and scheduling which is common in rural newspapers as to criminal matters.

None of the publicity reviewed by the Court reveals a situation such as that presented in *Rideau v. Louisiana,* 373 U.S. 723 (1963), in which the defendant confessed to several crimes committed in a parish in Louisiana, which confession was videotaped and broadcast on three occasions by a local television station, with the broadcast being seen by 24,000, 52,000 and 29,000 people within the community. *See* 373 U.S. at 724. (*See also* Remand Order of the Court of Appeals for the Eleventh Circuit, footnote 8). No statements of Petitioner Coleman or any of his coindictees were made public by means of newspaper accounts or electronic means. Additionally, there were very few statements made by the prosecution team trying the case, except the statement that there were perhaps 50 potential witnesses to be called at the trial of the defendants, with approximately only 20 persons who would actually be called to testify, and the statement that Billy Isaacs was expected to testify for the prosecution against his

coindictees. There were statements made by Petitioner Coleman's lawyer and the other attorneys, but even these statements were brief and generally did not comment on any of the evidence which might be brought out at trial. There were very few editorials concerning the crime and most persons quoted in the newspaper did not make public comments about what punishment they believed that the persons responsible for the murders deserved.

It seems clear that the nature of the publicity provided Seminole County citizens and citizens of the southwest Georgia area with a great deal of information concerning the crimes and the suspects and that this publicity, as well as word-of-mouth communication, aroused citizens' interest in the crimes, but this Court can in no way characterize the majority of the publicity, either in newspaper form or as contained in electronic media broadcasts, as having been of that brand of publicity referred to as "yellow journalism". The Court can find no "barrage of inflammatory publicity" in the record before this Court such as discussed in *Murphy v. Florida*, 421 U.S. 794, 798 (1975), as cited in *Patton v. Yount, supra.*

In *Mayola v. Alabama*, 623 F2d 992 (5 Cir. 1980), Michael Mayola, who was convicted of the first degree murder of an eleven year old boy, contended intensive pretrial publicity and community prejudice had prevailed in Oneonta, Alabama and the surrounding county. The United States Court of Appeals for the Fifth Circuit found that the publicity in that case was "highly prejudicial" because it contained references to erroneous reports showing that the victim had been sexually assaulted and mutilated and made recurring references to Mayola's prior convictions.

The Court also found that there were "exploitative illusions to alleged sexual perversion". *Id.* at 998. A perusal of the record before this Court reveals no such misstatement of the facts surrounding the commission of the crimes or the evidence ultimately admitted in the trial of Petitioner or his coindictees. Although arguably two detective magazines found in the Donalsonville, Georgia area contained rather explicit descriptions of the crimes and the suspects, these magazines were introduced at the original hearing on the motions for change of venue and it was revealed that one of the magazines was removed from a local newsstand because the owner of the newsstand felt the article written concerning the murders in Seminole County was "misleading". (Motion for change of venue hearing transcript, p. 7.) It has never been established that persons who may have bought this magazine were citizens of Seminole County and therefore prospective jury members.

Headlines from the Donalsonville News illustrate the straightforward type of news reporting generally found in the pretrial publicity submitted for examination: Thursday, May 24, 1973, "Four Are Accused of Alday Murders"; Thursday, May 31, 1973, "No Date Set for Committal Hearings for Four Accused in Alday Murders"; June 14, 1973, "New Lawyers Are Named to Four Charged with Murder"; Thursday, July 19, 1973, "Committal Hearing Time Set For Accused in Alday Case"; Thursday, September 6, 197., "Grand Jury Returns total of 19 charges in Alday Cases"; Thursday, October 11, 1973, "Judge Geer Sets December Date for Alday Murder Trial".

Similarly, excerpts from the Georgia Network News tapes reveal the following types of information being

communicated by radio or television: 8:30 a.m., Tuesday, May 15, 1973, ". . . authorities in Donalsonville, Georgia say they have found the bodies of five persons, all said to be members of one family, shot dead in a house trailer. Details of the incident are sketchy. . . . ;" 3:30 p.m., Tuesday, May 15, 1973, "We have new developments at this hour in the mass murder of six members of the Alday family of Donalsonville in southwest Georgia. Police are now looking for prison escapees from up north"; 9:30 a.m., Friday, May 18, 1973, "Police in West Virginia using dogs captured the remaining three of four suspects in connection of the six Alday murders . . . ."; 12:30 p.m., Friday, May 18, 1973, "A sigh of relief, and then more tragedy in Donalsonville, Georgia today. The sigh comes from the ultimate capture this morning of the remaining three fugitives at large in the six Alday murders from Tuesday morning . . . the tragedy comes with the word that the mother of Mary Alday, who police say was raped, then murdered near Donalsonville, died of a heart attack earlier today . . . Sheriff White said he's had no specific threats of a lynching . . ."; 7:30 a.m., Monday, May 21, 1973, "Averett Alday found the bodies of five of the six victims last Thursday. Now he's asking Seminole Countians to keep their heads during these emotionally charged days. He says enough folks have been hurt already"; 8:30 a.m., Monday, May 21, 1973, "within the hour, the four suspects in the killings of six members of the Alday family of Seminole County take off from Atlanta for a flight to Donalsonville and a pretrial hearing in the charges they murdered the six Aldays a week ago tonight. Their bodies were discovered by another Alday, Bud, last Tuesday. And Bud Alday is now urging his neighbors in the town of twenty-five hundred to keep

calm while the four suspects go through the criminal justice system. . . ."; 12:30 p.m., Monday, May 21, 1973, ". . . here are the latest developments in the Donalsonville murders . . . the four arrived and were turned over to Seminole County Sheriff Dan White and escorted into the courthouse. There was a crowd of about one hundred inside, about the same number outside. According to State Division of Investigation Director Bill Beardsley, the crowd has been quiet. [Recording] "Well, they just appear interested. They certainly are taking everything in and just paying attention to what's going on"; 2:30 p.m., Monday, May 21, 1973, "Those four suspects in the Alday murders in southwest Georgia have been taken before a preliminary hearing in Donalsonville. One of the four asked for a mental examination. As for the citizens of Donalsonville, apparently they're keeping their cool, in spite of the intense emotion which followed the mass murders last week. Division of Investigation Chief Bill Beardsley told us he doesn't expect any problem: [Recording] "Oh, no, no, uh-uh. These are very sophisticated people down here. We didn't anticipate anything, and I'm just sure there won't be anything"; 4:30 p.m., Wednesday, August 8, 1973, "Committal hearings were scheduled today in Donalsonville, Georgia for three of the four defendants in the Alday murder case. The three are charged with the murders of six members of a south Georgia farm family earlier this year. Today's hearings were behind closed doors and under tight security."

By selecting the above quoted excerpts from the *Donalsonville News* and from the Georgia Network News tapes, the Court does not intend to place undue emphasis on either of the two sources or to imply that only the

selected references were reviewed by the Court, but the selection does indicates types of materials that were contained in those two sources, as well as in some of the previously mentioned sources.

In short, this Court finds as fact that a majority of the news reports with reference to these crimes were straightforward, factual and non-inflammatory, and that a great deal of the publicity revealed that community tension which was initially high, subsided and, as will be discussed, culminated in the trials of the three persons ultimately tried for murder in a "controlled" courtroom atmosphere.

While Petitioner Coleman has not specifically alleged that there was a "carnival atmosphere" in the courtroom as found to exist in such cases as *Estes v. Texas,* 381 U.S. 532 (1965), and *Sheppard v. Maxwell,* 384 U.S. 333 (1966), the Court deems the atmosphere in the courtroom during the trials to be important in determining the impact of any publicity on the community so as to determine if Petitioner Coleman was denied his right to a fundamentally fair trial. All of the evidence shows that citizens of Seminole County who were prospective jurors were barred from the court proceedings and that tape recorders, cameras and other electronic equipment was banned from the courtroom. Additionally, presiding Judge Geer limited the press to a specific area of the courtroom and allowed limited ingress and egress. Judge Geer was not required to quell any emotional outbursts from the Alday family members or spectators in the courtroom during the trials. By way of example, Reporter William Montgomery of the *Atlanta Journal* testified that at crucial points in the first trial, that of Carl J. Isaacs, there may have

been about fifteen reporters in the courtroom, whereas at the time of Petitioner Coleman's trial, the number of reporters had decreased to about half a dozen including simply the two wire services, the *Atlanta Journal/ Constitution,* the *Albany Herald* and one or two others. Mr. Montgomery also testified that the crowds in the courtrooms "dropped off" during the following trials of George Dungee and Petitioner Coleman, with the exception of the days on which Billy Isaacs would testify against Mr. Dungee or Petitioner Coleman. Mr. Montgomery testified that there was no "weeping or wailing" in the courtroom, that there were no shouts of grief from the audience and that generally the courtroom atmosphere was such that it was not necessary for the judge to demand order in the courtroom. Similar testimony was given by Mr. Bill Cotterill of the United Press International, as well as other persons testifying who were present in the courtroom during the trial. Therefore, instead of causing additional prejudice to Petitioner Coleman, the testimony shows that the publicity and attention devoted to the trials decreased somewhat with each trial, except when Billy Isaacs gave his explicit and graphic testimony in the trial of each of the three coindictees.

There are many other observations which this Court could make about the amount of publicity and its nature, but to comment specifically on all evidence before the Court is unnecessary and would serve little purpose at this juncture. The Court simply repeats that it does not find that the pretrial publicity given to the trials of those charged with the Alday murders was sufficiently "prejudicial", "inflammatory", or "impassioned" as to amount to a denial of fundamental fairness or that the

setting of the trial was inherently prejudicial as a matter of fact so as to render the trials fundamentally unfair.

Having made these Findings of Fact, and having previously noted the law to be applied in this case, the Court reiterates that the principle of "presumptive prejudice", as the United States Court of Appeals for the Fifth Circuit noted, is only "rarely applicable". *Mayola v. State of Alabama, supra,* at 997, *quoting Nebraska Press Association v. Stuart,* 427 U.S. 539, 544 (1976). Further, the Court in *Mayola* stated that a petitioner must demonstrate an extreme situation of inflammatory pretrial publicity that saturates the community in which the trial is conducted and declined to apply the presumptive prejudice standard of *Rideau v. Louisiana, supra.*

Having reviewed the landmark cases in the area of alleged prejudicial pretrial publicity, in light of the recent decision of the United States Supreme Court in *Patton v. Yount, supra,* this Court simply finds that Petitioner has failed to carry his burden of establishing "essential unfairness", as the result of alleged prejudicial pretrial publicity. Petitioner has established neither actual nor presumptive prejudice due to the volume or nature of the pretrial publicity, considered in the context of the nature of the community, the nature of the victims, the nature of the defendants and all other relevant factors.

Succinctly stated, this Court concludes that Coleman was not convicted because of pretrial publicity. He was convicted and received the sentence imposed because of the overwhelming uncontradicted evidence of his wilful participation in what is generally regarded as the most hein-

ous criminal orgy in the history of the state. Therefore, the Court denies Petitioner federal habeas corpus relief based on his allegation of prejudicial pretrial publicity.

The only other allegation concerning which Petitioner presented additional factual material is his contention that the special prosecutor's participation in the trial deprived him of his constitutional rights. The special prosecutor, Peter Zack Geer, testified that sitting with him at the prosecution's table during the trial of Petitioner Coleman and his two coindictees, was the local District Attorney, Ralph Foster, Alto Lee from Dothan, Alabama, an Assistant Attorney General from the State Law Department and Law Enforcement Officer Ronnie Angel. Mr. Geer testified "every contact that I had with the case in any court, the district attorney was present". He stated that he basically was the member of the prosecution team who dealt with the evidence, but that Mr. Foster was present at all times.

Mr. Geer testified that he did not conduct any of the investigation and that he relied on District Attorney Foster for his expertise concerning people in the community, as well as the expertise of local attorney, Kenneth Hornsby, who also assisted the prosecution team. Mr. Geer testified that he did not discuss the trial with the Aldays as it progressed and that he did not discuss the case with the Sheriff, except as the Sheriff's testimony related to the case. He stated that he "mechanically tried" the cases, but that District Attorney Foster was constantly at his side and that he "was seeking his counsel at all times", and that he would not have done anything without consulting the District Attorney of the Circuit and obtaining his approval, both in pretrial and trial matters and that he had

nothing to do with the cases until after the suspects had been indicted.

Mr. Alto Lee, of Dothan, Alabama, also a member of the prosecution team, testified that he participated in the trial of the three coindictees for the Alday murders and that his participation amounted to organizational work and the presentation of witnesses. He stated that he examined a few witnesses and made an opening presentation to the jury in each of the three cases. Mr. Lee testified that the prosecution team would gather in the mornings before the trials to review the witnesses to be called and what the State expected to prove by means of these witnesses. He stated that at the preliminary hearing Foster and Geer conducted the hearing, and the Alday family members did not sit at counsel table.

Billy Isaacs testified that he was only in the courtroom during his own testimony and that he based his previously expressed opinion that Mr. Geer was running the prosecution on the fact that Mr. Geer examined him on behalf of the prosecution. Dave Harrison, a Reporter with the *Albany Herald*, testified that sitting at the counsel table for the prosecution was Mr. Geer; District Attorney Ralph Foster, now deceased; Mr. Alto Lee from Alabama; and a Donalsonville attorney, Mr. Hornsby. He stated that he observed Mr. Geer consulting with other members of the prosecutorial team at counsel table during trial.

Petitioner has established no specific manner in which Mr. Geer's participation as lead counsel of the prosecution team consisting of three other attorneys, including the District Attorney in the Circuit, has prejudiced him or denied him a fair trial. As this Court noted in its original

order denying Petitioner Coleman federal habeas corpus relief, there is no constitutional prohibition against the use of special prosecutors as long as the District Attorney retains control and management of the prosecution and the special prosecutor is not guilty of conduct prejudicial to the defendant and the rights of the defendant are duly observed. *See Powers v. Hauck,* 399 F2d 322, 325 (5 Cir. 1968), and *Woods v. Linahan,* 648 F2d 973, 976 (5 Cir. 1981). This Court is forced to conclude as it did in the first order denying federal habeas corpus relief, that there is no evidence that the actions of the special prosecutor operated in any way to deprive Petitioner Coleman of due process or of a fundamentally fair trial and it is apparent that Petitioner's rights were duly observed and protected throughout the Seminole County proceedings. The Court also points out, as it did in its original order, that there was no objection at trial to the special prosecutor's participation, nor was the issue raised on direct appeal to the Supreme Court of Georgia.

For all of these reasons, this Court reaffirms its original finding that this allegation lacks the substance necessary to serve as the basis for the granting of federal habeas corpus relief.

CONCLUSION

WHEREFORE, in accordance with the remand Order of the United States Court of Appeals for the Eleventh Circuit as supplemented by later orders, this Court now certifies these Findings of Fact and Conclusions of Law

to the Court of Appeals for its consideration and the disposition of Petitioner Coleman's appeal.

This 18th day of March, 1985.

/s/ J. Robert Elliott
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8310

WAYNE CARL COLEMAN,

Petitioner-Appellant,

v.

RALPH KEMP, Warden, Georgia Diagnostic and Classification Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(December 9, 1985)

Before JOHNSON, ANDERSON and CLARK, Circuit Judges.

ANDERSON, Circuit Judge:

In this capital case, petitioner Wayne Coleman appeals from the federal district court's order denying his petition for habeas corpus relief. At trial, the state's evidence revealed the following tragic facts. On May 14, 1973, Coleman and Carl Isaacs entered Jerry Alday's mobile home in Donalsonville, in Seminole County, Georgia, while their two companions, George Dungee and Billy Isaacs, remained outside initially. Several members of the Alday family began to arrive shortly thereafter. When Ned and Jerry Alday drove up in a jeep, Coleman, Carl Isaacs and Billy Isaacs forced the two to enter the home. Coleman then forced Ned Alday into the home's north bedroom and shot him in the head several times. Carl Isaacs forced Jerry Alday into the south bedroom and shot him in the head several times. Jimmy Alday then drove up on a tractor,

knocked on the door, and entered. Carl Isaacs forced him into the living room and shot him to death. Mary Alday, Jerry's wife, then drove up and Carl Isaacs forced her inside. Immediately thereafter, Aubrey and Chester Alday arrived in a pickup truck. While Mary Alday was forced into the bathroom, Carl Isaacs took Aubrey to the south bedroom and killed him. Coleman took Chester Alday to the other bedroom and killed him there. Mary Alday was then raped on the kitchen floor, taken from the mobile home, raped again in a wooded area, and then shot to death by Dungee.[1]

On September 4, 1973, a Seminole County grand jury indicted Coleman, Carl Isaacs, Dungee, and Billy Isaacs on six counts of murder. Some three months later, Billy Isaacs pleaded guilty to armed robbery and burglary. He was sentenced to a forty-year prison term. In January, 1974, the three remaining defendants were tried separately, convicted, and sentenced to death by electrocution. Carl Isaacs' trial began on Monday, December 31, 1973; Dungee's trial began the following Monday, January 7, 1974, and Coleman's on the next succeeding Monday, January 14.

The Supreme Court of Georgia affirmed Coleman's convictions and sentences. The United States Supreme Court subsequently denied his petition for writ of certiorari. *Coleman v. State,* 237 Ga. 84, 226 S.E.2d 911 (1976) (Justice Hill dissenting on the basis of the pretrial publicity), *cert. denied,* 431 U.S. 909 (1977). Coleman filed a state habeas corpus petition in the Superior Court of Tattnall County. On June 13, 1980, the superior court denied Coleman's habeas corpus petition. On October 31, 1980, the Supreme Court of Georgia denied Coleman's application for a certificate of probable cause to appeal. The

United States Supreme Court denied Coleman's second petition for writ of certiorari. *Coleman v. Balkcom,* 451 U.S. 949 (1981).

On July 8, 1981, Coleman filed for habeas corpus relief in the United States District Court for the Middle District of Georgia. In answer to Coleman's habeas corpus petition, respondent conceded that Coleman had exhausted available state remedies for the issues raised in his petition. The district court denied Coleman's petition. *Coleman v. Zant,* No. 81-42-THOM (M.D. Ga. Mar. 11, 1982). Coleman appealed to his court. Among other issues, Coleman argued that the federal district court erred in denying his request for discovery and an evidentiary hearing. After reviewing the record, we remand to the district court for an evidentiary hearing. *Coleman v. Zant,* 708 F.2d 541 (11th Cir. 1983). After further evidentiary development, the district court on March 18, 1985, again denied Coleman's petition for habeas corpus relief.

Petitioner raises six issues: (1) whether pretrial publicity and the community's atmosphere were so prejudicial and inflammatory that the trial court's refusal to grant petitioner's motion for a change of venue deprived him of rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments; (2) whether the special prosecutor's participation in the trial deprived him of rights guaranteed by the Sixth, Eighth and Fourteenth Amendments; (3) whether the Constitution required the state trial judge's disqualification because he was the special prosecutor's uncle; (4) whether the trial court's jury instructions impermissibly shifted the burden of proof of intent and malice from the state to the defendant in violation of the Fourteenth Amendment's due process clause; (5) whether petitioner

was denied effective assistance of counsel; and (6) whether the trial court's sentencing instructions adequately informed the jury as to its duty to consider mitigating circumstances. Since we conclude that this case is of that rare breed which does exceed the extremely high threshold test of presumed prejudice requiring a change of venue, we decline to rule on the other issues raised by Coleman.

In Part I we discuss briefly the relevant legal standard. In Part II, we describe the publicity surrounding the petitioner's trial. To convey an accurate picture of the sentiment in this small rural community, we have found it necessary to provide a comprehensive description of the publicity, beginning with the printed media, then the broadcast media, and finally, word-of-mouth communication in Seminole County. In Part III, we apply the legal standard to the totality of the circumstances generated by the publicity surrounding the petitioner's trial, as evidenced by the record in the case.

I. PRESUMED PREJUDICE AND A CHANGE OF OF VENUE

The standards governing the change of venue issue were explained briefly in *Coleman v. Zant,* 708 F.2d 541, 544 (11th Cir. 1983), but those standards bear repeating. Ultimately, those standards derive from the Fourteenth Amendment's due process clause, which safeguards a defendant's Sixth Amendment right to be tried by "a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd,* 366 U.S. 717, 722 (1961). The trial court may be unable to seat an impartial jury because of prejudicial pretrial publicity or an inflammed community atmosphere. In such a case, due process requires the trial court to grant defendant's motion

for a change of venue, *Rideau v. Louisiana,* 373 U.S. 723, 726 (1963), or a continuance, *Sheppard v. Maxwell,* 384 U.S. 333, 362-63 (1966). At issue is the fundamental fairness of the defendant's trial, *Murphy v. Florida,* 421 U.S. 794, 799 (1975). There are two standards which guide analysis of this question, the "actual prejudice" standard and the "presumed prejudice" standard. Because we grant relief on the presumed prejudice claim, we do not address the actual prejudice argument raised by Coleman.

Prejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held. *Rideau v. Louisiana,* 373 U.S. at 726-27; *Murphy v. Florida,* 421 U.S. at 798-99; *Mayola v. Alabama,* 623 F.2d 992, 997 (5th Cir. 1980),[2] *cert. denied,* 451 U.S. 913 (1981); *see also Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Estes v. Texas,* 381 U.S. 532 (1965). The presumed prejudice principle is "rare-[ly]" applicable, *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 554 (1976), and is reserved for an "extreme situation." *Mayola, supra,* at 997. In fact, our research has uncovered only a very few additional cases in which relief was granted on the basis of presumed prejudice. *See United States ex rel. Bloeth v. Denno,* 313 F.2d 364 (2d Cir.), *cert. denied,* 372 U.S. 978 (1963); *Pamplin v. Mason,* 364 F.2d 1 (5th Cir. 1966). The particular standard was clearly stated in *Mayola v. Alabama* "where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community, '[jury] prejudice is presumed and

there is no further duty to establish bias.'" 623 F.2d at 997 (quoting in part from *United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980)).

Because the question whether prejudice should be presumed is by its very nature shaped by the facts, we begin by reviewing the two key Supreme Court cases on that issue. *Rideau v. Louisiana*, 373 U.S. 723 (1963), is the only Supreme Court decision in which prejudice was presumed from pretrial publicity and no other outside influences. In *Rideau*, the defendant confessed to robbing a bank in Calcasieu Parish, kidnapping three of the bank's employees, and killing one of them. This confession was videotaped and subsequently broadcast three times by a local television station. The three broadcasts were seen respectively by 24,000, 53,000, and 29,000 people in the community. *Id.* at 724. At that time, Calcasieu Parish had a population of 150,000. At trial, the defendant's motion for a change of venue was denied by the trial court. The Supreme Court held that this denial violated the due process clause. Although the court noted that three jurors who decided the case (the defendant was convicted and sentenced to death) had seen the televised confession, *id.* at 725, the Court was willing to presume prejudice "without pausing to examine a particularized transcript of the voir dire examination of the members of the jury." *Id.* at 727. In the Court's view, the televised confession "*was* Rideau's trial," and "[a]ny subsequent proceedings in the community so pervasively exposed to such a spectacle could be but a hollow formality." *Id.* at 726.

The other important case where a defendant called for the Supreme Court to presume prejudice based on preju-

dicial publicity was *Murphy v. Florida,* 421 U.S. 794 (1975). There the Supreme Court held that the defendant was not denied due process when the trial court denied his motion for a change of venue. The defendant had been convicted in 1970 of offenses related to a robbery that took place in January 1968. In 1968 and 1969, the defendant was indicted for murder in another county, declared mentally incompetent, indicted on a federal conspiracy charge, and later declared competent. All of these events were extensively publicized since the defendant himself was newsworthy by virtue of his earlier participation in the 1964 theft of the Star of Indian sapphire. The Court rejected defendant's presumed prejudice claim, however, finding that there was no inflammed community atmosphere, and noting that the news articles complained of appeared seven to twenty months before the jury was selected and that the articles were "largely factual in nature." 421 U.S. at 802.

II. THE PRETRIAL PUBLICITY

With this background, we consider petitioner's claim that prejudicial pretrial publicity saturated Seminole County. Because the degree of saturation of publicity in Seminole County is relevant, we note the general population characteristics in Seminole County according to the 1970 Census. Seminole County's population was 7,059, and there were 2,117 households. Because the presumed prejudice claim requires an extensive evidentiary showing to warrant relief and because we are required to assess the "totality of the circumstances" in examining the petitioner's claim, an extensive discussion of the pretrial publicity is in order.

There were several sources of publicity in Seminole County in May of 1973. Newspaper coverage constitutes the most significant single source of the pretrial publicity in the record. The *Donalsonville News*, a weekly newspaper with a circulation of 1,800, or approximately 85 percent of the households in Seminole County, was the most widely-distributed newspaper in Seminole County; we examine it first.[3]

In the May 17, 1973 edition of the *Donalsonville News*, headlines read "Community shocked by murder of six members of the Alday family." By the time the May 17, 1973, *Donalsonville News* was published, petitioner Coleman and his co-indictees had already been identified as suspects in the case, and their mugshots were displayed on the front page of the *Donalsonville News*. Similarly, the article identified Coleman and his co-indictees as being escapees from a Maryland prison.

Another front-page article in the May 17 *Donalsonville News* entitled "Authorities conducting intensive search for escapees from Maryland" quoted one of the escapees as stating that he would "kill any policeman who tries to stop us for any reason." The article also noted the possibility that Coleman and his co-indictees might have been responsible for the murder of a Pennsylvania youth, Richard Wayne Miller, whose car was found near the body of one of the victims. The article quoted William Beardsley, the director of the Georgia Department of Investigation, as saying that the circumstantial evidence against the four suspects was overpowering, and "[t]here's no point in looking for anybody else."

A third front-page article in the May 17 *Donalsonville News* described a proclamation issued by the Mayor of Donalsonville requesting all merchants and businesses to close between the hours of 3 and 4 during the funeral to show respect for the victims' family.

Finally, a fourth front-page article described the funeral service which was scheduled for that day.

The May 24, 1973 *Donalsonville News* headlines read "Four are accused of Alday murders." Below the article was a photograph of Carl and Billy Isaacs being taken to the arraignment hearing. The article described how petitioner Coleman had confessed to the killing of a Pennsylvania youth, Richard Miller, and how Coleman was to accompany authorities to Pennsylvania to help them search for Miller's body. The article also reported that Peter Zack Geer, the former Lieutenant Governor of Georgia, had been named special prosecutor in the case. In the article, Geer described his prior representation of the Aldays and how he had hunted and fished with two of the victims. The article also reported that at his arraignment, defendant Coleman "seemed to smirk and smile when the district attorney asked if he understood each of the charges against him." The article concluded by noting that there was "considerable talk about the four accused killers getting a fair trial in Seminole County." However, one of the surviving family members was quoted as stating that "[o]ur people in this county are good people . . . [t]hey just want to see justice done and I believe the court will take care of that."

Another front-page article in the May 24 *Donalsonville News* reported that two months earlier, Governor Jimmy

Carter had approved a new death penalty statute for the state. The article went on to list the circumstances under which the death penalty could be imposed.

The district court viewed a front-page editorial in the May 24 *Donalsonville News* as typical of the publicity surrounding the crime. The editorial states, in pertinent part:

> Some folks says the best thing to do is to refuse to acknowledge a stupid question, but the stupids have been so frequent lately, let's go ahead and put it into print, so maybe they'll hush.
>
> Yes, the four men suspected and accused of the murder of the six Aldays can get a fair trial in Seminole County.
>
> And now that you've asked a question, how about answering one: Whatever gave you the idea of asking such a ridiculous question?
>
> While we're at it, let's go on and say a few words more.
>
> The four suspects cannot get a passive, indifferent trial here. Nor could any other such characters. But they could get a fair one.
>
> What's the difference? The people of this community are capable of cooperating with and respecting the various steps toward their trial. They's angry, very angry, about what happened on May 14, and they have never had much use for shiftless, sorry people. They were not the ones who abolished the death penalty and if you had run a survey months before the murders happened you would have found the people here opposed to doing away with it in cases in which the death penalty fits.
>
> There is a wide difference in the question of whether the people here could give the suspects a fair

trial, and in our wanting to see the guilty ones punished and removed from being able to commit the same outrages again, a few years from now, on other innocent people.

But our people want to be sure that the suspects now being held in jail are the ones who committed the crimes. We don't want to see four innocent men punished, if they should turn out to be innocent of the charges against them, and the other charges to come.

A man is said to be considered innocent until he is proven guilty. As for whether the people of our community are biased, unfair and not capable of rendering a fair verdict, how about exercising the same courtesy to our people as you offer to a defendant.

We're innocent of bias and prejudice, until you prove us guilty.

Wait. There are a few screwballs among us who get a thrill out of talking dumb and sounding off about what all they'd like to do to the four men. No denying this.

But they're in the extreme minority, and they are pretty well known for their lack of sense.

Bud Alday spoke the sentiments of his family when he said they didn't want to see anybody else get hurt in this terrible tragedy that came our way. "Enough people have been hurt already," he said.

The Aldays know how painful such suffering is, and they're wise enough, and concerned enough to not want to see more violence and sorrow.

And there's no room for error here. The only thing that any kind of mob action, or inciting troublesome thoughts can bring is more sorrow.

Think about this often, as the long, drawn-out trial days go slowly along. It's a hard fact of life, and there's no profit in forgetting it. The law must be obeyed.

On page 2 of the May 24 *Donalsonville News* the headline read "Four suspects in Alday murder case left a long trail of trouble, sorrow." The article was a reprint of an article which had appeared earlier in *The Dothan Eagle*. The article began by noting that "[t]he coldblooded trail of a quartet of confessed killers leads to Seminole County again tomorrow, one week after the bullet-riddled bodies of six Alday family members were left in the South Georgia County." Pictures of each of the murder victims accompanied the article as well as a photograph of the six coffins at the funeral. The article continued with a dramatized account of how the murders might have taken place. By the article's own terms, it was "mostly conjecture backed up by evidence collected by a state toxicologist." In the article, petitioner Coleman was reported as having admitted killing the Pennsylvania youth. Similarly, the article described Mrs. Mary Alday's mother, who died from a heart attack several days after the commission of the crime, as another victim. The article also reported that Pennsylvania authorities wanted to question the suspects concerning the death of a Pennsylvania woman who had befriended Carl and William Isaacs when their car broke down near her home. According to the article, "[t]his, authorities say, could bring the number of victims to eight or nine if Mrs. Alday's mother is counted." The article then described Carl and William Isaacs as well as Wayne Coleman as having "started their journey toward their ultimate destiny at Donalsonville when they were quite young." According to the article, the mother of Carl and William Isaacs and Wayne Coleman described the boys as "habitual delinquents and truants" who "lacked respect for their family and stole from their mother and other area

homes." A Maryland prison guard was quoted as describing Carl and William Isaacs as well as Wayne Coleman as "just plain mean."

The May 24 edition of the *Donalsonville News* also contained at page 9 a reprint of an editorial from the *Camilla Enterprise*. The editorial began by congratulating law enforcement officials for the swiftness with which they apprehended the suspects. The article then lamented the fact that law enforcement officials were unable to prevent the tragedy from occurring. According to the editorial, "[i]f you review the situation, it will lead you to the conclusion that the last half of the process of treatment and disposition of criminal cases must bear the major portion of the blame." According to the article, for most mass murders of the last decade "in general not too gross or difficult a punishment has been handed out." The article concluded by noting that,

> There is no single law that will correct our present conditions, nor any quick easy solutions, but there is just no place in society for the kind of individuals who place no value on the life of any other individual with whom they come in contact.
>
> We kill rattlesnakes because they kill anything they come in contact with. We likewise shoot mad dogs or other rabid animals.
>
> When individuals become as these lower animals, they lose their right to human treatment.

Burson, *As We See It*, *Donalsonville News*, May 24, 1973, at 9, col. 1.

The May 31, 1973, edition of the *Donalsonville News* was headlined "No date set for committal hearings for four accused in Alday murders." The article described

the upcoming committal hearing and noted that the trial court had appointed eight lawyers in the area to defend the suspects. The article stated that "[a]pparently none of the eight lawyers named want the job, but under the law in such cases, the judge must appoint defenders for the accused, and there are stiff and severe penalties for attorneys who refuse." The article also described three of the suspects as escapees and noted that Coleman had been flown to Pennsylvania the previous week to "search for the body of the youth he is said to have admitted killing shortly after the prison escape, before the four came to Donalsonville."

On page 2 of the May 31 edition of the *Donalsonville News* the headline read "Police use two psychics in search for body of Maryland high school senior." The article described how Maryland police were using two psychics to attempt to locate the body of Richard Miller, a Pennsylvania youth. The article concluded by noting that "Coleman told police that after he escaped from a Maryland work camp, he shot and killed Miller and left his body beside a road in western Maryland near the Pennsylvania border."

Page 10 of the May 31 edition of the *Donalsonville News* contained a reprint of an editorial in the *Houston Home Journal*. The editorial stated in pertinent part:

> The horrible tragedy that struck the Alday farm family in rural Seminole County last week could have very well occurred right here in Houston County. This just wasn't the route the vicious killers took in their escape from a Maryland minimum security prison.

The brutal, senseless murders of six members of the Alday family should serve as another warning to all society that there is a need for capital punishment in this country. How can anyone who is aware of this heinous crime, still maintain that capital punishment is too harsh and should be stricken from our society for all time?

The Alday case is a perfect case for capital punishment. It shows all too well our system of today with dealing with criminals is not working. Three of the persons charged with the execution style killings, escaped from a prison that was preparing them for life on the outside. They were to be released soon back into society. It seems clear that there are some criminals that just cannot be rehabilitated and should not be returned to society to destroy the lives of innocent, hard-working, people like the Aldays.

. . .

Those who oppose capital punishment argue that it is not a deterrent to brutal crimes. But it has been so long since we had an execution in Georgia that there is [sic] really no current statistics for an accurate evaluation. On the other hand, brutal crimes have climbed out of sight in the past several years and that ought to tell the "do-gooders" something about capital punishment.

Look at it this way. When a person is convicted by the courts beyond a reasonable doubt of a crime like the slaughter of the Alday family, it seems to me there is nothing else society can do. It is absurd to accept the argument that such a criminal can be made to see the error of his ways. As long as such a criminal lives, he is indeed a threat to society. If he is put into prison, he has the opportunity for escape or parole. If he is executed, society has nothing more to fear from such a criminal.

Branch. *Out on a Branch*, Donalsonville News, May 31, 1973, at 10, col. 1.

The June 7, 1973, front-page headline of the *Donalsonville News* read "Body of youth is identified, 7th victim of Alday killers?" The first paragraph of the article reported that the Pennsylvania youth's disappearance "was traced to four men charged with the slaying of the six members of the Alday family in Seminole County on May 14." The article noted that the Pennsylvania youth was killed with a gunshot to the back of the head in the same method used to kill the Aldays. The article further stated that a Maryland state trooper found the body after piecing together information given to him by Carl Isaacs. The article continued on page 2 and noted that the suspects were apprehended near a roadblock in West Virginia after having stolen a car in Alabama and committed an armed robbery in Virginia "after leaving Donalsonville."

The same article also noted that one of the lawyers appointed in the case, Julian Webb, a state senator from the Donalsonville district, had been excused from the case. Senator Webb was quoted as stating, "I absolutely cannot in good conscience, both personally and professionally, defend any of the accused."

Page 6 of the June 7 edition of the *Donalsonville News* reprinted an editorial from the *Baxley News-Banner*. The editorial discussed the need for state Department of Investigation agents to have state-wide arresting powers. According to the editorial, the need "to track down the escaped convicts who brutally killed six members of the Alday family in Seminole County" demonstrated the need for such state-wide arresting powers. According to the article it was "a credit to law enforcement officers that the four criminals were so promptly apprehended and brought

back to Seminole County to face life-long friends and relatives of the six members of the Alday family who had been murdered in cold blood."

The June 14, 1973, front-page headline of the *Donalsonville News* read "New lawyers are named to four charged with murder." Except for its implication that the death penalty was appropriate in the case, the article was in other respects merely factual. Another front-page article entitled "Maryland to seek indictments, too," noted that an "Alleganey County (Maryland) prosecutor" indicated that the four suspects would be indicted for the murder of Pennsylvania youth Richard Miller, as well.

The July 12, 1973 headline in the *Donalsonville News* stated: "Attorneys ask hearing for accused in Alday murders." Except for a brief repetition of facts of the crimes, including a reference to finding the nude body of Mary Alday and except for a suggestion that the case could involve the death penalty, the accompanying article contained only a description of procedural steps.

The July 19, 1973 *Donalsonville News* reported in a front-page headline that "Committal hearing time set for accused in Alday case." The article dealt primarily with procedural matters, but did note that the four suspects were not only charged with the murder of the six Aldays but also faced murder charges in the death of the Pennsylvania youth Richard Miller. The article also briefly repeated the facts of the crimes.

The front-page headline in the July 26, 1973 *Donalsonville News* read: "Carl Isaacs Ordered Held for Action of Grand Jury." The article reported that Carl Isaacs was bound over to the Seminole County Grand Jury after

a closed committal hearing. Although the hearing was closed to the press and the public, the *Donalsonville News* reported that testimony at the hearing "centered mainly around fingerprints left by the suspects at the mobile home where the five Alday men were slain, and fingerprints found in a car owned by Jerry Alday, which was found abandoned in Livingston, Ala." The article noted the interest of one of the defense attorneys in the constitutionality of the death penalty law, and the fact that Sen. Julian Webb was relieved from appointment in the case because he had sponsored the new death penalty statute. The article again noted that the four suspects were also charged with the death of Pennsylvania youth Richard Miller. Similarly, the article noted that Mary Alday had been raped and shot in the back of the head as well as noting that the men had been shot in the back of the head. The article also recapitulated the details of the suspects' escape from a Maryland minimum security prison and the details of their arrest in West Virginia. Finally, the article concluded by noting that petitioner Coleman had reportedly confessed to the Pennsylvania murder of Richard Miller.

The August 23, 1973 issue of the *Donalsonville News* contained the front-page headline "Grand jury drawn to serve for special term Sept. 4th." The article briefly described the grand jury procedures and contained no prejudicial information.

In the September 6, 1973 issue of the *Donalsonville News*, the headline read "Grand jury returns total of 19 charges in Alday cases." The bulk of the article was factual and described the indictments returned by the grand jury, although the article did remind readers that the

suspects' "arrest climaxed a massive manhunt that carried the men from their escape from a Maryland prison on May 10 down the Atlantic seaboard, westward through Seminole County, to western Alabama, and back through Kentucky and Tennessee before they were arrested in Lynch, West Virginia."

The September 13, 1973 issue of the *Donalsonville News* contained the headline "Lawyers seek changes for accused in Alday slayings." The headline and much of the article was factual and nonprejudicial, describing how attorneys for William Isaacs had sought to get his case transferred to juvenile court, and indicating that attorneys for Carl Isaacs had filed a motion for change of venue. However, the article again noted that the suspects' "arrests climaxed a massive manhunt that carried the men from their escape from a Maryland prison on May 10 down the Atlantic coast, westward through Seminole County, to Livingston, Ala., and back up through Kentucky and Tennessee before they were arrested in Lynch, West Virginia." The article also indicated that the suspects were accused of "several other crimes along that route, including the murder of a Pennsylvania youth and at least two counts of armed robbery." The article also reprinted a letter from the trial court judge to the attorneys for Carl Isaacs which cautioned the attorneys about "trifling with the Court." Among other things, the letter stated:

> I think that now is a good time to get this message to you. I expect you and your law partner to do everything within your power to defend your client, but at the same time I expect you to respect the Court and not to undertake to trifle with the Court. In short, what I have reference to here is that in your Motion for Change of Venue you request that the trial be held

> in one of several place outside of the Pataula Judicial Circuit and several places beyond the limits of the State of Georgia. I notice in the Press that your law partner in his press release or in a statement to the press recognized the fact that this could not be done. Why it was done I do not know. I call to your attention that you came into this case voluntarily and you are welcome in this case and always welcome to practice law in the Pataula Judicial Circuit and I assure you that the court at no time will be disrespectful to you or your associates or clients nor to anyone else intentionally. I will not tolerate any trifling with the Court by you or anyone else.

The October 11, 1973 *Donalsonville News* front-page headline read "Judge Geer sets December date for Alday murder trial." The article reported the upcoming trial dates and noted that the trial judge had denied the defendants' motion for change of venue. Although the article primarily reported procedural aspects of the case, the article did remind readers that each of the victims "had been shot several times in the back of the head." The article also noted that Mary Alday's body had been found in the woods on a neighboring farm and that she had been shot and raped.

The December 27, 1973 *Donalsonville News* front-page headline read "Accused in Alday Murders Go on Trial Here Monday" The article first reported that Billy Isaacs had pleaded guilty to charges of burglary and armed robbery the previous Friday. The article then noted in five separate instances that Billy Isaacs was expected to be a key witness in the prosecution's case. They read:

> He [Billy Isaacs] is expected to be a key witness for the prosecution in the coming trials, according to a reliable source.
>
> . . .

> Billy Isaacs, 16, one of four Maryland men charged in the Alday family slayings in Seminole County, is expected to be a key witness for the prosecution against his brothers and a third companion whose trials are scheduled to begin Dec. 31.
>
> . . .
>
> Young Isaacs, who has been confined in the Randolph County Jail at Cuthbert since late May, could well be the only eye witness to the crime available to the prosecution.
>
> . . .
>
> Isaacs has also reportedly issued a statement to lawmen describing the slayings of Ned Alday, his three sons, Jimmy, Jerry, and Chester, his brother Aubrey, and his daughter-in-law, Mary Campbell Alday.
>
> . . .
>
> Although informed courthouse sources maintain the younger Isaacs will be a key witness against his companions, special prosecutor Peter Zack Geer, of Albany, Saturday declined comment on the possibility that the youth will be called to testify.

The article also noted that the four suspects "were arrested in West Virginia following a robbery attempt in neighboring Virginia." In addition, the article stated that "Coleman has also admitted the slaying of a 19-year-old Pennsylvania youth, Richard Miller."

The January 3, 1974 *Donalsonville News* front-page contained pictures of Carl Isaacs and the two sets of opposing lawyers. The front-page headline read "First Alday murder trial underway. Billy Isaacs testifies on events that took place May 14; Carl Isaacs first to face

jury." Among other things, the article noted that the special prosecutors retained to assist in the prosecution of the case, Mr. Geer and Mr. Lee, were "longtime friends of the victims of the May 14th slayings, and of their families." The article then noted that Carl Isaacs' attorney, Bobby Hill, "indicated his primary purpose [in taking the case] is to test the state's new capital punishment law." The article also reported that the prosecution was expected to ask for the death penalty in each of the three pending cases. The article then published the names and occupations of each of the jurors selected in Carl Isaacs' case. The article also reported that most of special prosecutor Geer's questioning of prospective jurors centered on the death penalty and stated that jurors who indicated any opposition to the death penalty were struck by Mr. Geer. The article stated that prospective jurors who indicated a strong belief in capital punishment were struck by the defense. The article also noted that "[d]ozens of reporters from newspapers, radio and television stations and wire services were on hand to cover the trial, part of the story that was selected as the second biggest story in the entire state last year." The article also indicated that fingerprint experts from the state crime lab testified that Carl Isaacs' fingerprints were found at the murder scene. The article noted that Mary Alday's watch was found in the possession of one of the defendants and was introduced as evidence in the case. The article indicated that Carl Isaacs remained expressionless, "even when he glanced at enlarged photographs of the dead Aldays his attorneys were studying." Finally, the article concluded by noting that the state's "objective will be to prove each of the men had a part in the murders, without emphasizing which man pulled the trigger on which particular victim."

Also appearing on the front page was the headline "16-year-old Billy takes stand and tells of tragic 'spree' of violence they brought to the Aldays." In its entirety, the newspaper account of Billy Isaacs' testimony read as follows:

> Billy Isaacs took the stand Wednesday morning to outline just how the six members of the Ned Alday family were killed on May 14.
>
> He said that the "spree" started out in Baltimore, Md., and ended up at Jerry Alday's mobile home about 4 p.m. on May 14.
>
> Billy testified that Wayne Coleman and Carl Isaacs went into Jerry's unlocked mobile home when no one was home. While they were in there, Billy said two men in a blue jeep came to the mobile home and they were forced at gunpoint to go inside the trailer.
>
> Billy said he forced the older man to empty his pockets and that Carl took a pen knife, wallet, some change and a cigarette lighter from the younger man who apparently was Jerry Alday since Carl asked him if he was married and lived in the trailer residence.
>
> The younger man said he did live in the mobile home and that he was married and his wife would soon be home. He said the man begged Carl not to hurt her.
>
> Carl took one of the men into the south bedroom and Wayne took the other in the north bedroom, Billy said. Shortly thereafter he heard shots in both bedrooms.
>
> Just about the time that Carl and Wayne came back to the kitchen a "middle-aged" man pulled into the yard on a John Deere tractor. Billy said he got off the tractor and knocked on the closed back door. Then Carl opened the door and stuck a gun in his face and made him come into the trailer.

Billy said Carl made the man take off his green coveralls, sunglasses and hat and then took him into the living room where he made him lie face down on the sofa. The younger Isaacs said Carl then shot the man one time in the head.

A short time later Mary Alday arrived at the trailer and Carl who was moving the tractor, came around back of her, stuck a gun in her back and forced her into the mobile home.

Billy said that while Carl was going through the woman's purse two men in a green pickup truck drove into the yard. Billy said he and Carl ran around the trailer and came up on each side of the pickup from the back side. He said Carl stuck a gun in the driver's face and both men were forced into the mobile home.

The men were made to sit on the floor, and Mary, who was standing beside the doorway told them that the man in the living room was hurt.

Carl then took Dungee and Mrs. Alday in a bathroom, he said. Then he came back and took one of the men in the south bedroom and Wayne took the other man in the north bedroom.

Billy said there were shots in the north bedroom but only clicking noises in the south bedroom because Carl's gun was empty. He said Carl came back into the kitchen and grabbed his .38 cl. pistol and went back into the bedroom where two shots were fired.

"He came out laughing," Billy said. "Carl told us 'that bastard begged me for mercy.' "

Billy said he went outside with Wayne to help them transfer "their stuff" from their car to Mrs. Alday's automobile. When he went back inside Mrs. Alday was lying on the floor with the bottom part of her pants suit off and her top around her neck. He said Carl was standing by the table with his pants down.

Later Mrs. Alday was forced to go with the four men. She left the trailer fully clothed but with a handkerchief around her eyes and mouth and her hands tied behind her.

Billy said they went down the road a ways after pushing off their car with Mary's car, but that Wayne discovered he had lost his wallet and they went back to the trailer home to get it.

Then, Billy said they went to some woods and "wiped" their car of fingerprints.

He said that Mrs. Alday was raped several times in the clearing before she was shot.

Then all four got into Mrs. Alday's car and went to Alabama.

The January 10, 1974 issue of the *Donalsonville News* contained the front-page headline "Two found guilty in Alday murders. Third man to go on trial here next Monday morning." Under the headline was a picture of Dungee between two major articles. The article on the left was headlined, "Carl Isaacs, 19, first to hear jury's verdict of death by electrocution," and reported that the jury took only 68 minutes to find the defendant guilty of murder and only 38 minutes to decide that he should receive the death penalty. The article then noted that the jurors struggled for two hours to render a verdict which was considered acceptable under the law. According to the article, "[t]here were no indications of any waivering or doubt by the members of the jury, and on the seventh effort the correct verdict was entered into the court records." The article then noted that Carl Isaacs' attorneys contemplated an appeal in the case. The article stated:

Hill [Isaacs' attorney] made no secret that he took the case as a part of his battle against the death

penalty, and not because he thought Isaacs and his companions were innocent. He made no effort to proclaim and establish innocence during the trial.

In his statements to the jury, Hill and Farrington seemed to be basing all their efforts toward admitting Isaacs was guilty of the charges against him, but there should be no death sentence. Instead, he claimed the defendant should be placed in prison and studied.

The article also reported that in Carl Isaacs' case, the jury found aggravating circumstances of robbery, burglary, rape, and kidnapping. The article also stated that defendant Carl Isaacs yawned when special prosecutor Geer asked the jury to impose the death penalty in his closing argument.

A second front-page article, to the right of Dungee's picture, in the January 10 *Donalsonville News* was entitled "George Dungee, 35, second on trial, found guilty of May 14th murders." After reporting that the jury had returned the death penalty in Dungee's case, the article stated "Dungee made no signs of emotion. In fact, remarked one observer, he looked bored." The article noted that the jury took 58 minutes to reach the guilty verdict, and approximately 2 hours to return the death sentence. The article also reported that although Dungee actually pulled the trigger on only one victim, the jury found him guilty on all six counts because state law "provides for guilt of all aiding and/or abetting such crimes." As in the Carl Isaacs case, all the names of the jurors on Dungee's panel were listed in the newspaper. The article stated that "Billy Isaacs testified Tuesday that he personally saw prison escapee George Dungee assault and kill Mrs. Mary Alday last May, after her husband and four other Alday

men had been murdered earlier in the day." The article recounted how "Billy again went through a detailed description of the execution-style murders of the six Aldays after he, Carl, Dungee and Wayne Colemen arrived at the mobile home of Mary and Jerry Alday, last May 14th." The article also noted that, despite special prosecutor Geer's remark in his opening statement that he intended to introduce a confession from Dungee, he failed to do so after defense attorneys said that they would move to suppress the confession. The article also contained a detailed account of Billy Isaacs' testimony in the Dungee case. It stated:

> Billy said that after he and the other three men took Mrs. Alday to the woods where they forced her to take off her clothes, he saw Dungee assault the young woman, later forcing her to lie face down on the ground and shooting her twice in the back.
>
> Billy testified that Carl initially handed Coleman a pistol to shoot Mrs. Alday with, but then Dungee commented, "What about me?"
>
> Billy said Coleman "shrugged his shoulders," handed the pistol over to Dungee, who then forced Mrs. Alday to walk a short way from them and shot her.
>
> The younger Isaacs boy said that after Dungee had shot Mrs. Alday, he reached down and took her Timex wrist watch from her arm and put it in his pocket. Other testimony during the day had indicated that the stolen watch was the same one found on Dungee when he and the other three men were arrested in West Virginia.

A third front-page article in the January 10, 1974 issue of the *Donalsonville News* was headlined "Trial of Wayne Coleman, 26, to open at 9:30 in Seminole Superior Court," and was accompanied by a picture of Coleman.

After noting petitioner Coleman's upcoming trial date, the article reminded readers of the fact that Coleman also faced charges in Maryland in the death of a Pennsylvania youth, Richard Miller. The article stated that the Pennsylvania youth "was slain with a gunshot wound in the back of the head, the same method used to kill the Aldays." Finally, the article noted that petitioner Coleman, Carl Isaacs, and George Dungee were all escapees from a Maryland prison.

The Albany Herald was also distributed in Seminole County and had a daily circulation of 518. It contained numerous stories concerning the Alday case.

The May 15, 1973 front-page headline in *The Albany Herald* read "Family of Six Discovered Slain Near Donalsonville." The article recounted how the bodies of six members of the Alday family had been discovered. The article noted that there were few leads at that point, but that one witness told police that Mrs. Mary Alday was seen leaving her home yesterday and being followed by three "hippie types." The article concluded with a quotation from Seminole County Coroner Paul Mosley in which he stated that "[t]his is something that sounds like the wild West. Things like this just don't happen here. These are things that you read about that happen in places like Chicago."

The May 16 edition of *The Albany Herald* contained the front-page headline "Seminole Killers Object of Nationwide Dragnet." Pictures of the four suspects were placed immediately beneath the headline. The first sentence of the article identified three of the four suspects as escaped convicts. The article also stated that the suspects

were believed to have abducted a Pennsylvania youth, Richard Miller. According to the article, "[o]fficials also said several other unsolved slayings along the Eastern Seaboard may be linked to the four." The article also noted that "the three escapees were serving terms for convictions of crimes ranging from robbery to burglary."

Another article at page 5 of the May 16 *Albany Herald* was headlined "One of Victims Shot 7 Times." The article quoted Coroner Paul Mosley as stating that "[y]ou can cover the bullet holes with a half dollar."

Another front-page article in the May 16 *Albany Herald* was entitled "Couldn't Think of Nobody Disliking Them." The article began by noting that the "slaughter of a quiet, clean-living farm family has left their southwest Georgia neighbors in enraged shock." A local resident, speaking of the deceased victims, stated that he "couldn't think of nobody disliking them." The article generally described the high esteem neighbors held for the Alday family. The article also noted that the four suspects sought in connection with the killings were escapees from a Maryland prison.

The May 17 *Albany Herald* contained the front-page headline "Alday Vehicle Found in Alabama. Reports on Suspects Pour In." The article began by noting that "sorrowing Seminole County witnessed the mass funeral service for the Alday family." The article noted that the Alday car had been found near Livingston, Alabama, and stated that "three escaped convicts and a fourth person [were] being sought in connection with the most brutal mass slayings in Georgia history." In the same article, Georgia Division of Investigation Director William

Beardsley indicated that a fingerprint found at the scene of the crime had been identified as belonging to Carl Isaacs. Beardsley further described circumstantial evidence against the four suspects as "overpowering" and stated "[t]here's no point in looking for anybody else."

Another front-page article in the May 17 *Albany Herald* was headlined "Grieving Family Ponders Slaying of Six Loved Ones. Governor Offers Assistance." In the article, a special assistant to Governor Jimmy Carter indicated that the slaying "was perhaps the worst crime in Georgia history."

In a third article on page 5 of the May 17 *Albany Herald,* the headline read, "Sheriff Wants Revenge but Beholden to Badge. 'I'd Precook Them.'" The article quoted Sheriff Dan White as follows:

> If I had my way about it, I'd have me a large oven and I'd precook them for several days, just keep them alive and let them punish. . . . And I don't think that would satisfy me.

The article continued and stated that "[t]he integrity of the twenty-year veteran of law enforcement, however, overrides such emotion." Sheriff White stated:

> Whenever I'm protecting them, I'm going to do my job and bring them to court, and I hope they'll get justice.
>
> . . .
>
> I don't see where they could put up any plea for mercy. . . . The acts of these men are lower than animals.
>
> If a citizen gets out of hand and starts shooting people up, there's only one way to arrest and that's with a shotgun.

> Any man that believes in God believes in capital punishment. . . . I could throw the switch to the electric chair and never lose a minute's sleep.

Another page 5 article in the May 17 *Albany Herald* was headlined "Suspects Reported in Texas," and quoted a Texas service station operator as having spotted the suspects in east Texas. In the same article, a Georgia official was reported as stating that there was ballistics evidence that the four suspects had killed the members of the Alday family.

The May 18 front-page headline of *The Albany Herald* read "Seminole Slay Suspects Caught in West Virginia." The article generally recounted the manner in which the suspects were apprehended in West Virginia and noted that the police roadblock was set up after the four men robbed a grocery store across the border in Virginia. In the article, Sheriff Dan White was reported as having stated that the suspects would not be jailed in Seminole County when they were brought to Georgia "because of ill feeling among residents of the rural community." Sheriff White stated, "They will be jailed outside of Seminole County. I have an obligation to protect everybody. I want them brought to court. I want them brought to justice." The article indicated that the defendants had been involved in a crime spree along the Eastern Seaboard, and that additional charges against the four suspects would probably include murder in Pennsylvania, auto theft in Alabama, and robbery in Virginia.

Another front-page article in the May 18 *Albany Herald* was headlined "Deserve What They Get: Mother of Slay Suspects." The first sentence of the article quoted the mother of Carl and Billy Isaacs and Wayne Coleman

as stating "[t]hey are old enough to know right from wrong and deserve what they get when captured." The article also noted that Isaacs, Coleman and Dungee were escapees from a Maryland prison where Isaacs and Coleman were serving terms for burglary and Dungee was serving a sentence for contempt of court. The article concluded with a quote from Mrs. Isaacs, "[t]hey had no respect for their family and those people in Georgia. How can they expect any from us?"

Another front-page article in the May 18 *Albany Herald* contained the headline "Mrs. Alday's Mother Dies at Colquitt." In the article, a local physician stated that "complications arising from Mrs. Campbell's diabetic condition and grief over her daughter's slaying probably caused her death."

A fourth front-page article in the May 18 *Albany Herald* was headlined "Thousands Attend Biggest Funeral Ever in Sowega." According to the article, "[i]t was by far the largest funeral ever conducted in Southwest Georgia." The article described dignitaries attending the funeral as including Tommy Irwin, State Agriculture Commissioner; Mrs. Jimmy Carter, the governor's wife;[4] Hugh Broom, Chairman of the State Board of Transportation; and Cloyd Hall, a special assistant to Governor Carter.

The May 19 edition of *The Albany Herald* was headlined "Alday Slay Suspects to be Returned to Donalsonville." The front-page article generally described how the suspects had waived extradition to Georgia, and it also noted that the four would likely face charges of escape in Maryland, murder in Pennsylvania, armed robbery in

Virginia, and auto theft in Alabama. In the same article, Coleman was reported to have confessed to an FBI agent to the murder of Pennsylvania youth Richard Miller. When asked why the Pennsylvania youth was killed, Coleman was reported as stating because "he didn't want any witnesses." In the same article, Georgia Division of Investigation Director William Beardsley stated that it would be up to Sheriff Dan White as to where the suspects would be placed when they arrived in Seminole County. Beardsley added, however, that he disagreed with reports that the suspects might not be safe in Seminole County. Beardsley stated, "I don't believe there are that kind of people down there. I think they will be adequately treated."

The May 20 edition of *The Albany Herald* contained the front-page headline "Sheriff Maintains: Seminole Jail Inadequate to Hold Slaying Suspects." In the article, the sheriff was reported as saying that the inadequacy of the Seminole County Jail was the sole reason for the suspects being held outside Seminole County in that fear of mob vengeance had nothing to do with the decision. Despite Sheriff White's remarks, the article stated that "[h]owever, residents have talked to lynching since the bodies of the six were found in a mobile home of the Alday farm early Tuesday. Some have mentioned other forms of extreme punishments for the killers." In the article, the prospect of a change of venue was mentioned and Sheriff White stated his belief that the four would stand trial in Seminole County. The sheriff further remarked, however, that "[i]f it were left up to me, I'd like to go ahead and try them today and get it over with." The headline in another front-page article in the May 20 *Albany Herald* read

"Gun Sales on Rise in Rural Seminole." In the article, local gun store operators reported that there had been a noticeable increase in the sale of firearms in Seminole County.

Pictures of the four suspects being led to their extradition covered the front page of the May 22 edition of *The Albany Herald* and a headline read "Four Arraigned Without Incident." The article generally recounted the security precautions taken by police in transporting the suspects to their arraignment hearing. The article, however, also reported petitioner Coleman's confession to the murder of Pennsylvania youth Richard Miller. Coleman was again quoted as stating that Miller was killed because they did not "want any witnesses." The article concluded by noting that Peter Zack Geer, former Lieutenant Governor of Georgia and a personal friend of the victims, had been hired by the surviving members of the family to act as a special prosecutor in the case.

Another front-page headline in the May 22 *Albany Herald* read "Donalsonville Slay Suspect Snickers as Charges Read. Army of Lawmen Guards Men." According to the article, talk of vengeance was the reason why numerous state troopers and Georgia Department of Investigation officers were on hand to escort the prisoners to the arraignment hearing. The article reported that "Coleman threw his head back slightly and snickered" when asked whether he understood the charges against him. The article also noted that when the arraignment hearing was completed, and Coleman was escorted toward the door, his "eyes stopped on a female reporter from one of the wire services who had been sitting on the back row of the jury

box." The female reporter was then quoted as saying, "I don't like the way he looked at me. God, did you see the way he looked at me?" The article also quoted special prosecutor Geer as stating that he had a "special interest" in the case since he had known the Aldays for a long time and had hunted and fished with two of the victims. The article concluded by noting that Geer will help in the prosecution of what has been described as the "worse [sic] crime in Georgia history."

On page 6 of the May 23 edition of *The Albany Herald* the headline read "First Day's Search for Body Futile. Suspect 'Unable or Unwilling.'" The article described how petitioner Coleman had been taken to Pennsylvania to assist in locating the body of Pennsylvania youth Richard Miller. The article also noted that Coleman reportedly confessed to the killing of Miller to eliminate witnesses who might later identify him.

An article on the front page of the May 24 *Albany Herald* was headlined "Alday Suspects Could Face Death." The article noted that a newly enacted state death penalty law could be applied to the four suspects. The article also indicated that three of the suspects, Carl Isaacs, Coleman, and Dungee, were escapees from a Maryland prison. The article stated that Coleman was serving a ten-year sentence for robbery; Isaacs, a four-year sentence for burglary; and Dungee, an eighteen-month sentence for contempt of court.

The May 25 edition of *The Albany Herald* contained front-page headlines: "Judge Names Attorneys for Alday Slay Suspects. Nobody Wants Job." The article recounted how the trial court had named eight attorneys to

defend the four accused but that "apparently none of the eight want the job." Attorney Harold Lambert was quoted as stating that "[t]his is the worst thing that's ever happened to me professionally. There's just no way I can get out of it. I pleaded with the judge for about 15 minutes yesterday but he apparently didn't see any of my reasons as either legal or valid." Other attorneys were quoted as stating that "they planned to provide the best courtroom defense, but with 'reluctance.'" The article also recounted how state senator Julian Webb of Donalsonville "does not want the job." According to the article, Webb stated that he should be excused from the case because of his close relationship with the victims' family and because of his sponsorship of the Georgia death penalty statute, which would likely be at issue in the case.

The May 26 *Albany Herald* contained an article at page 5 which was headlined "Psychic Pair Leads Lawmen in Search for Missing Youth. Alday Slay Link." The article described how Maryland and Pennsylvania authorities had used two psychics to try and locate the body of a Pennsylvania youth, Richard Miller. The article noted that the youth "is believed to have been murdered by Wayne Coleman." The article concluded by noting that "Coleman told police that after he escaped from a Maryland work camp, he shot and killed Miller and left his body beside a road in western Maryland near the Pennsylvania border."

Another article at page 5A of the May 26 *Albany Herald* contained the headline "Blakely Lawyer Also Protests Alday Slayings Defense Role." In the article, attorney Tracey Moulton complained of the law which required Superior Court judges to appoint counsel for indigent de-

fendants. Although Moulton's complaints focused on the "terrible financial burden" that representation of petitioner Coleman would impose, he was also quoted as stating that attorneys appointed to defend the four suspects would face a "loss of money and friends." Of the eight attorneys appointed to represent the defendants, the article stated that "all say they did not want to become actively involved in the defense."

At page 5 of the June 4 edition of *The Albany Herald* the headline read "Seventh Victim of Alday Suspects Said Found. In Pennsylvania." The article briefly reported how the body of Pennsylvania youth Richard Miller had been found near the Pennsylvania-Maryland border. The article also stated that "[i]n a confession to the FBI, Wayne Coleman, 26, said he shot and killed Miller after he and his three companions commandeered the victim's car near here."

In the June 8 edition of *The Albany Herald* an article on page 3 was headlined "Hoe Hands for Alday Work Sought." The article briefly recounted how volunteers were needed to help hoe the peanut fields on the Alday farm.

An article on page 6B of the June 13 edition of *The Albany Herald* started with the headline "Bainbridge Attorney Happy With Alday Slay Case Relief." In the first sentence of the article, attorney J. Willis Conger "summed up his feelings of a court order releasing him as co-counsel" by stating, "[s]ince the judge signed the order at noon yesterday there's nothing anybody could say to me that could make me mad." The article also stated that "[a]ll eight [appointed attorneys] have voiced strong protests

over their appointments." The article also noted that the substituted lawyers volunteered as part of their attempt to overrule the newly enacted death penalty statute.

The June 14 issue of *The Albany Herald* contained an article headlined "Father's Day Dedicated to Alday Family." The article on page 17A briefly recounted how Father's Day in Seminole County had been declared "Alday Memorial Day." On that day, all churches in the county were to take up a special collection for the Alday Memorial Fund to be used for a new sanctuary for the Spring Creek Baptist Church.

An article on page 12B of the June 22 edition of *The Albany Herald* was headlined "Alday Slay Suspects Did Not Ask for Committal Hearing, Foster Says." In the article, district attorney Ralph Foster stated that the four suspects have not requested a committal hearing. Foster was quoted as saying that the four "will be indicted for murder." The district attorney further stated that he had "no doubts the four suspects would receive a fair trial in Donalsonville." The district attorney was quoted as saying that he was "sure the jury will listen to the defense of these attorneys. A person is entitled to a good defense [and] a lawyer of their choice."

Headlines for an article which appeared in the July 5 edition of *The Albany Herald* stated: "Alday Case Could Test Death Penalty."[5] In the article, attorney Harold Lambert was quoted as stating that "if they [the defendants] are found guilty I believe this case will be used to determine whether the state's death penalty law will stand up before the Supreme Court." The article continued, noting that the newly-enacted Georgia death penalty statute had not yet been subjected to appellate court scrutiny.

Headlines for an article which appeared in the July 6 edition of *The Albany Herald* read "Closed Hearing Sought for Alday Slay Suspect." The article on page 10A described how attorneys for Carl Isaacs were seeking a closed committal hearing to limit press coverage in the case and assure their client's right to a fair trial. In addition to the factual and nonprejudicial description of the request for a closed committal hearing, the article also noted that murder charges had been filed against petitioner Coleman in the death of a Pennsylvania youth, Richard Miller. The article stated that both "Georgia and Pennsylvania authorities say Coleman admitted killing Miller after the youth attempted to stop him, the elder Isaacs, and Dungee shortly after they escaped from a Maryland minimum security prison." The article continued, noting that Carl Isaacs' attorneys, Hill and Farrington, "earlier said . . . [they] had 'volunteered' to represent Isaacs in an effort to continue their fight against a new, but yet untested capital punishment bill passed by the general assembly."

A front-page article in the July 19 edition of *The Albany Herald* contained the headline "Closed Preliminary Hearing Set for Alday Slay Suspect." Although the article focused on nonprejudicial procedural matters, it also reported the facts of the crimes, the Isaacs' defense attorney's interest in challenging the new death penalty statute, and noted that petitioner Coleman had been charged with the murder of Pennsylvania youth Richard Miller and that Miller's car was found near the body of Mrs. Mary Alday.

An article in the July 21 edition of *The Albany Herald* was headlined "Attorneys Await Outcome of Slay Sus-

pect's Hearing." The page 5A article described how attorneys for all the suspects other than Carl Isaacs were awaiting the evidence presented at Carl Isaacs' preliminary hearing before deciding whether they would request similar proceedings for their clints. According to the article, "[s]everal of the eight court-appointed attorneys representing the four defendants have voiced reluctance at accepting the cases but now say they have no choice but to follow the court order."

A front-page headline in the July 22 edition of *The Albany Herald* read "Alday Slay Suspect to Face Grand Jury," accompanied by a photograph of Carl Isaacs. The article briefly recounted how Carl Isaacs was bound over to the grand jury at his committal hearing. Although the hearing was closed, the article stated: "[t]estimony Saturday [at the hearing] centered mainly around fingerprints left by the suspects at the mobile home where five of the six bodies were found and fingerprints found in a car owned by Jerry Alday, which was found abandoned in Livingston, Ala." Once again, the article stated that "Coleman reportedly told police of an earlier murder in which a Pennsylvania youth was slain when he attempted to recover a stolen pickup truck from the elder Isaacs, Coleman, and Dungee."

An article on page 9A of the August 7 *Albany Herald* contained the headline "Remaining Alday Slay Suspects Face Hearing." The article began by stating that security at the upcoming hearing was expected to be heavy. The article quoted "a court spokesman who asked not [to] be identified" as stating that the major portion of the testimony at the committal hearing previously held for Carl Isaacs centered around fingerprints found at the vic-

tims' trailer and similar evidence found in a car stolen from the house.

A subsequent article appeared on page 8A of the August 8 edition of *The Albany Herald* and was headlined "Security Stringent at 3 Alday Slay Suspects' Hearing." The article began by indicating that security was heavy at the preliminary hearing held for the three remaining suspects. The article also stated that the state expected to call four witnesses at the hearing "to present evidence found at the death scene and in a stolen automobile." The article then recounted how the suspects were arrested when they attempted to break through a roadblock "erected after Virginia law enforcement officials reported a car they were chasing had crossed into West Virginia following an armed robbery." The article then noted that petitioner Coleman was also accused of the murder of a Pennsylvania youth, Richard Miller.

The headline for a page 7A article in the August 9 edition of *The Albany Herald* stated: "Three Alday Slay Suspects to Face Grand Jury Action." The article began by noting that the three remaining suspects were bound over for grand jury action at their preliminary hearing. The article again stated that "[t]estimony reportedly centered around fingerprints found at the murder scene and in a car stolen from a mobile home where five of the victims were found." The article also noted that the four suspects were arrested when they attempted to break through a road block set up by West Virginia authorities after they were notified that Virginia authorities were pursuing four men suspected of the armed robbery of a Virginia store. The article further recounted that "Carl

Coleman also told investigators that he had killed a Pennsylvania youth shortly after he, both Isaacs and Dungee had escaped from a Maryland prison."

A front-page headline in the Sunday, August 26 edition of *The Albany Herald* read "Attorney for Alday Slay Suspects Says He Will Ask Venue Change." The article indicated that Carl Isaacs' attorney, Bobby Hill, stated that he intended to seek a change of venue if his client was indicted by the grand jury. The article noted Isaacs' attorneys' interest in the case as an opportunity to challenge the new death penalty statute, and also noted that three of the four suspects were escapees from a minimum security prison in Maryland, that Coleman was also charged with another murder in Pennsylvania, and that Coleman reportedly confessed to the murder of the Pennsylvania youth to FBI agents.

A headline on page 20 of the August 28 edition of *The Albany Herald* read "Second Alday Slay Suspect Attorney Says He Will Request Venue Change. Hits Newspaper Accounts." The article described how attorney Harold Lambert indicated that he would request a change of venue for petitioner Coleman. In the article, Lambert indicated that he planned to use news stories from *The Albany Herald* to support his claim that prejudicial publicity prevented his client from receiving a fair trial in Seminole County. Unlike the previous articles describing procedural maneuverings in the case, however, this article contained no recapitulation of the suspects' arrest, the Pennsylvania murder, and Coleman's confession to the Pennsylvania murder.

A front-page article in the September 4 edition of *The Albany Herald* read "Suspects in Alday Killings Face

Multiple Indictments." The article began by describing how each of the suspects would be indicted for six counts of murder and one count each of kidnapping, armed robbery, and burglary. The article also indicated that defendants Carl Isaacs, George Dungee, and Carl Coleman would also be indicted for rape. The article then stated that the suspects "were charged in the multiple slayings shortly after they were arrested on an armed robbery charge by West Virginia State Police." The article then indicated that petitioner Coleman had also been charged in the murder of a Pennsylvania youth, Richard Miller, whose car was found near Mrs. Alday's body.

A front-page article in the September 5 edition of *The Albany Herald* contained the headline "Lawyers for Accused Alday Killers Want Venue Change." The article described how attorneys for the four suspects were beginning their efforts to obtain a change of venue. The article was primarily factual and contained no prejudicial information concerning the defendants. The September 11 and September 14 issues of *The Albany Herald* contained similar nonprejudicial accounts of the defense attorneys' change of venue motions. A September 19 front-page article similarly dealt with motions to disqualify the trial judge, although that article also noted that the special prosecutor was hired by the family, that the defendants were escapees, and that Coleman had also been charged with the murder of the Pennsylvania youth.

The headline for an article in the September 21 edition of *The Albany Herald* read "Alday Slay Case Venue Change Hearing Thursday." The article on page 9A told how attorneys for the suspects were seeking to have the

trial moved outside Seminole County. The article also described how petitioner Coleman's attorneys had filed a motion for the trial judge to disqualify himself because of his relationship to special prosecutor Peter Zack Geer. The attorney was quoted as stating that he filed the motion primarily for "self protection." Attorney Lambert was quoted as stating that "[i]f Carl Wayne Coleman is found guilty I don't want anyone to say he had an incompetent attorney that did not request the judge to step down because he was the uncle of the prosecuting attorney." Finally, the article noted that special prosecutor Geer was hired by the surviving members of the Alday family to aid in the prosecution of the four suspects. A similar article on page 5A of the September 22 edition of *The Albany Herald* was headlined "Second Alday Slay Defense Hearing Slated in Seminole." The article described how hearings on motions filed in Coleman's case were scheduled to be heard the same day as those previously filed in Carl Isaacs' case. According to the article, Lambert filed a motion to disqualify the trial judge "because he did not want his client to charge him with overlooking the relationship between the judge and the special prosecutor if convicted in the slayings."

Finally, the headline in a front-page article in the September 27 edition of *The Albany Herald* read "Judge Won't Step Down in Alday Slaying Trials." The article described how the trial judge refused to disqualify himself due to his relationship to special prosecutor Geer. As with the earlier articles, this article stated that attorney Lambert filed the motion "mainly to protect himself from any future criticism."

An article in the September 28 *Albany Herald* was headlined "Judge Geer Delays Alday Slay Case Trial Venue Change Ruling." The page 9 article indicated that the trial judge would delay ruling on defense attorneys' motions for change of venue. The article summarized the arguments at the change of venue hearing and contained no prejudicial information.

An article in the September 30 edition of *The Albany Herald* contained the headline "Alday Ruling Expected Monday on Defense Motions." The article on page 6A focused primarily on procedural matters, but also repeated the facts of the crimes and noted that the four suspects "became the targets of a nationwide manhunt within hours after the [victims'] bodies were discovered," and that law enforcement officials "identified the four as suspects from fingerprints found in a car abandoned near Mrs. Alday's body." Similarly, an October 2 article dealt with procedural matters, although it did refer to Coleman and the other suspects as escapees from a Maryland prison.

A front-page article in the October 5 edition of *The Albany Herald* was headlined "Alday Slay Trial Delay Predicted." Although the article focused on procedural matters, it also indicated that Carl Isaacs' attorneys had been reprimanded for "trifling" with the court by requesting that the trial be moved outside Georgia.

An article in the October 7 edition of *The Albany Herald* was headlined "No Trial Date in Alday Case." The page 14A article briefly noted that Seminole Superior Court was set to convene on Monday but that there had been no indication that the trial of the four suspects would commence on that day. The article contained no prejudicial information.

The headline in a front-page article in the October 10 edition of *The Albany Herald* read "Judge Nixes Venue Change for Alday Slay Defendants." The article described how the trial judge denied defense attorneys' motions for a change of venue. The article told how special prosecutor Geer had argued that "pre-trial publicity does not constitute grounds for a change of venue according to two federal court rulings." The article also noted that the trial judge overruled a second motion by defense attorneys for Carl Isaacs to delay the trial at least 18 months in order that the effects of publicity might dissipate. Generally, the article merely described procedural maneuverings in the case, except for a brief repetition of the facts of the crime including the fact that Mary's body was found nude.

An article in the November 29 edition of *The Albany Herald* was headlined "Alday Slay Suspect Hearing Cancelled." The article began by noting that a hearing on defense motions to exclude certain evidence in the case had been cancelled after special proscutor Geer agreed not to enter the disputed material into evidence. Geer was quoted as stating that "I didn't really need the letter anyway." The article again recounted that the elder Isaacs, Coleman, and Dungee were escapees from a Maryland prison and that all three also faced murder charges in Pennsylvania.

An article in the December 5 edition of *The Albany Herald* contained the headline "Slain Husband, Sons 'Did Everything Together.'" Portions of the article read as follows:

> Mrs. Ned Alday walked down the dirt path from the house her husband had constructed in 1945.

She stopped, wiping tears from her eyes, looking as lonesome as any woman has ever looked.

The auctioneer was about to begin bidding for farm machinery her sons had accumulated. In the end, the sale would net more than $33,000, but Mrs. Alday wouldn't get the money.

A daughter-in-law, Barbara Alday, had requested the auction.

. . .

"They worked all their lives for this," she said, wiping her eyes.

. . .

"They did everything together," she said, speaking of Ned and her sons. "They joined the church together, they were baptized together, they were ordained as deacons together and they died together."

She talked about their last night alive.

. . .

"We never dreamed someone was going to come along and try to kill everybody," she said. "Somebody comes along who does not like to work and tries to take everything away from us."

In a front-page article in the Saturday December 22 edition of *The Albany Herald*, the headline read "Youth in Alday Slay Case Gets 40-Year Prison Term, State Sets Aside Murder Charges." Under the headline was a picture of Billy. The first sentence of the article stated that "Billy Wayne Isaacs, 16, late Friday admitted his involvement in the Seminole County Alday slay case and now faces a 40-year prison sentence." The article described how the youth received the sentence upon entry of a guilty plea to charges

of armed robbery and burglary. The article further indicated that murder charges against Bill Isaacs were dropped and stated that "Court sources said the youngster may be one of the prosecution's key witnesses when the murder trials begin Dec. 31." "Court officials said the youth had issued a statement describing the slayings in detail." The article also stated that the "elder Isaacs, Coleman and Dungee were escapees from a minimum security Maryland prison when the murders occurred." The article continued, noting that petitioner Coleman had also been charged in the slaying of Pennsylvania youth Richard Miller.

A front-page headline in the December 23 edition of *The Albany Herald* stated "Billy Isaacs Expected to Be Key State Witness in Alday Slay Trial." The first sentence of the article noted that the young Isaacs was "expected to be a key witness for the prosecution against his brothers and a third companion whose trials are scheduled to begin Dec. 31." According to the article, "[y]oung Isaacs . . . could well be the only eye witness to the crime available to the prosecution." The article further stated that "[a]lthough attorneys for the prosecution said they can present a strong case based on circumstantial evidence they could produce no eyewitnesses to the slayings." The article continued, noting that "Isaacs has also reportedly issued a statement to lawmen describing the slayings of . . . [the victims]." The article also stated that Carl Isaacs, George Dungee, and petitioner Coleman "were arrested in West Virginia following a robbery attempt in neighboring Virginia." According to the article, "Coleman has also admitted the slaying of a nineteen-year old Pennsylvania youth, Richard Miller."

The headline in an accompanying article on page 11A of the December 23 edition of *The Albany Herald* read "Alday Slay Figure's Mother Recalls Days of Nomadic Boyhood." In the article, Isaacs' mother, Mrs. Betty Isaacs, recounted how the family had moved from one place to another during Billy Isaacs' childhood. The article contained some favorable, humanizing information about Billy and noted that Billy Isaacs "is reported by Maryland authorities to have a less extensive record than his brother, Carl, and half-brother, Wayne Coleman, charged in the Alday slayings." The article stated that Billy Isaacs was resting at his mother's home "when his brothers and a black companion picked him up and began their crime spree." According to the article, Maryland authorities were reluctant to discuss Billy Isaacs because of the "disappointment and embarassment that the state could have severely misjudged the 15-year old." In the article, one Maryland official stated, "Don't ask me anything else. I don't want anybody saying I messed this up. You know how law is."

In another article in the December 23 edition of *The Albany Herald*, the page 9D headline read "Ice Storm, Alday Slayings Head Georgia's Top Stories of Year." According to the article, "[t]he brutal murder of a South Georgia farm family was selected as the No. 2 story of the year."

A subsequent article in the December 27 edition of *The Albany Herald* was headlined "Alday Slay Suspect Faces Arraignment." The article on page 8A told how petitioner Coleman was the only one of the three remaining defendants to request an arraignment. The article also indicated that Billy Isaacs "is expected to be called as one of the prosecuting key witnesses against his companions." The article stated that murder charges were filed against Coleman in Pennsylvania "after Coleman told agents of the Federal Bureau of Investigation and other law enforcement officers the [Pennsylvania] youth was killed when he attempted to interfere in the theft of a pick-up truck." The article concluded by noting that Coleman, Isaacs, and Dungee "are charged with killing the Pennsylvania youth shortly after escaping from a Maryland prison."

On Sunday December 30, 1973, the day before Carl Isaacs was to go on trial, pictures of Carl Isaacs, George Dungee, and Wayne Coleman all appeared on the top of the front page of *The Albany Herald.* The caption accompanying petitioner Coleman's photograph stated: "Wayne Coleman, Pennsylvania Slaying." The front-page headline in *The Albany Herald* read " 'Going to Be One Hell of a Court Session.' Alday Slay Trials Begin Monday." The first sentence of the article stated that "[o]ne of Georgia's most widely-publicized murder trials is to begin here Monday." One official was quoted as predicting that "[i]t's going to be one hell of a court session." In the article, a special assistant to Governor Jimmy Carter described the slayings as "the worst crime in Georgia history." The article then named the defendants as facing

possible death sentences and noted that they were escapees from a Maryland prison. The article then indicated that the first clues in the case came from fingerprints found inside the mobile home which "led to the identification of the four men believed involved." According to the article, "[f]ingerprints both inside the mobile home and those found in an abandoned car near Mrs. Alday's body were identified as those belonging to the four Maryland men by the Federal Bureau of Investigation." The article also told how an armed robbery at a small country store in Virginia and the ensuing highspeed chase "led to the apprehension of the four." The article also recounted how Coleman was taken to Pennsylvania "to aid in the search for a nineteen-year-old youth he reportedly said was killed while attempting to stop the escapees." The article also indicated that although rumors of mob action were heard in Southwest Georgia shortly after the four were returned, no overt threats were ever made.

In the December 31 edition of *The Albany Herald* a front-page headline read "Alday Slay Trial Jury Selection Process Begins." The article indicated that the jury selection process in Carl Isaacs' case had begun and described the restrictions placed upon the press by the trial judge. Other than reciting the facts of the crimes and noting that Carl Isaacs, Dungee and petitioner Coleman were escapees from a Maryland prison, the article referred only to procedural matters.

A headline with picture on the front page of the January 1 edition of *The Albany Herald* read "Widow's Ordeal Ending?" The article began by describing how surviving members of the victims' family, who sat on the third

row of the Seminole County courthouse, "[had] been waiting seven months to find out what happened in the house trailer on the afternoon of May 14." According to the article, the prosecution announced it would put an eyewitness to the crimes on the stand. The article then described the composition of the prosecution team and noted that Mr. Alto Lee, "offered his services as a special prosecutor because of his close relationship to the family in the past." Newsmen were quoted in the article as asking "[w]hy so many big guns for such an airtight case?" Special prosecutor Geer responded by stating that he thought the "case is much more important than most people realize." According to the article, Geer was "talking about the case becoming a test of a state law enacted last March that reimposes capital punishment in Georgia and is applicable in the case of the Alday slay suspects."

Another front-page article in the January 1 edition of *The Albany Herald* was headlined "Brother of 2 Victims Leads Off Testimony. Found Aldays' Bodies." The article described how a surviving member of the Alday family who found the victims' bodies led off testimony in Carl Isaacs' trial. This article also noted that special prosecutor Geer stated that he expects to introduce an eyewitness in the case. The article then explained that the eyewitness "would be Billy Isaacs, 16-year-old brother of Carl, who already has pleaded guilty to burglary and robbery charges." The article reminded readers that Geer was retained by the surviving members of the Alday family to act as a special prosecutor in the case. The article also described how the trial judge had taken special precautions to insure that potential jurors in the remaining two cases did not attend Carl Isaacs' trial.

The headline in a third front-page article in the January 1 edition of *The Albany Herald* read "Seminole Family Slayings Top Sowega Headliner." The article briefly recounted how the slaying of the Alday family was the area's top story of the year.

The January 2 edition of *The Albany Herald* contained a front-page headline, with pictures of the attorneys for both the prosecution and defense, which read "They Killed Alday Family, Younger Isaacs Tells Court, Billy Relates Travels." The first sentence of the article described how Billy Isaacs testified that "his older brother Carl and two other men methodically shot to death all five male members of the Alday family as they came into a mobile home." According to the article, Billy Isaacs "also testified about the rape and slaying of Mrs. Mary Alday, the sixth member of the prominent Seminole County farm family the four suspects have been accused of killing last May." The article also noted that Dungee and Coleman were charged along with Isaacs and indicated that all three were escapees from a Maryland prison. The article then recounted all the details of Billy Isaacs' testimony. The article indicated that Carl Isaacs and Coleman had killed the first two victims, that Dungee had killed Mary, and included a description of Billy's account of how Carl Isaacs came out of one of the bedrooms laughing after killing one of the victims and proclaimed, "[t]hat damned bastard begged for mercy." The article also related Billy's description of how Mrs. Mary Alday was repeatedly raped before she was shot to death. The article also spoke of the ballistics and fingerprint evidence presented at Carl Isaacs' trial. The article also summarized other testimony presented in the state's case against Carl Isaacs.

A headline on the front page of the January 3 edition of *The Albany Herald* stated "Seminole County Jurors Find Accused Mass Murderer Guilty," and was accompanied by a picture of an Alday family member and another picture of several jurors. The article described how the jury came back with a verdict of guilty and had retired to deliberate on the sentence. The article also told how attorneys for petitioner Coleman moved the court to suppress the jury's verdict in Isaacs' trial until the other two trials were conducted to prevent the verdict from influencing future juries. The article noted that the trial judge's overruling of the motion was "apparently based on a Georgia law which requires court procedures to be held in 'public and open court.'" The article also told readers how Billy Isaacs had "told a horror tale beginning when his brothers picked him up at a residence in Baltimore County, Md., where they began their crime spree, through the Alday slayings and on to their capture in West Virginia." The article again quoted Billy Isaacs' testimony in which he stated that Carl Isaacs went into the bedroom and shot one of the victims and "came out laughing, and Carl said to me, '[t]hat damn bastard begged for mercy.'" The article noted that the Alday women and others in the courtroom wept openly.

Another article on top of the front page of the January 3 edition of *The Albany Herald* was headlined "Billy Had 'An Urge' to Be With His Brothers." The article was accompanied by pictures of Billy and Carl Isaacs. The first sentence in the article described how "two half brothers and a black companion slipped from the window of the minimum security prison on the Eastern Shore of Maryland and managed to arrive at the brothers' Balti-

more County home before lunch the next day." The article also recounted how the suspects "stole a car and drove into Pennsylvania, to an area where they once had lived." According to the article, once in Pennsylvania, petitioner Coleman killed Pennsylvania youth Richard Miller "if his alleged confession is to be believed." The article described Miller as "a country boy, a young man who would have graduated from a small high school in three days." The article then noted that the four suspects fled south, "robbing stores along the way." The article also detailed the events of the last days of the victims' lives. The concluding portion of the article quoted a "community leader" as follows:

> We have witnessed one of the worst crimes in this section of the country, and had I had to speculate before this happened, I would have said our people would have taken the law into their own hands. I would have been wrong. There are a few rhetorical bullies here and there, but they wind up only crying for our friends. This has overwhelmed us. We are yet to be convinced that it happened.

In the January 4 edition of *The Albany Herald*, headlines read "Isaacs Sentenced to Die; Lawyers Planning Appeal, Execution Date of Feb. 15 ordered." The front-page article began by noting that Carl Isaacs had been found guilty and sentenced to death. The article noted that the four suspects "were originally charged with the murders following an interstate crime spree that ended when they were arrested in West Virginia." The article described Billy Isaacs as "the most damaging prosecution witness in his older brother's trial." In the article, the wife of one of the victims expressed her approval of the death sentence and stated that the suspects "deserved

more." Another family member was quoted as saying "So far, so good. Ask me later," which the article indicated referred to the upcoming trials.

Another front page article in the January 4 edition of *The Albany Herald* was headlined "Carl Just Looked at Jury. 'Been Good to Know You.'" Over the article was a picture of Carl Isaacs, captioned in part: "Showed little emotion." The article stated that the death sentence did not seem to bother Isaacs, and that he had shown little emotion throughout the trial. The article described Carl Isaacs' attorneys planned to appeal the verdict and sentence. The article also told how other inmates in the prison sang "So long, it's been good to know you . . ."

In the Sunday January 6 edition of *The Albany Herald*, a front-page headline read "Dungee Next to Face Jury in Seminole Alday Deaths." The article began by reporting that George Dungee was the next of the suspects expected to go to trial. The article also noted that Carl Isaacs had been found guilty and sentenced to death the previous week. Speaking of Carl Isaacs' trial, the article stated that "the high point in the trial came when sixteen-year-old Billy Isaacs took the stand describing in chilling detail the murders of the Alday family." The article told how Billy Isaacs had "described an eastern seaboard crime spree through Maryland, Pennsylvania, West Virginia, North Carolina, South Carolina, Georgia, and Florida." The article also indicated that petitioner Coleman "is charged with the murder of a nineteen-year-old Pennsylvania youth who reportedly attempted to stop the four suspects when he saw them stealing a pickup truck." According to the article, which was published on the day before Dungee's trial was to begin, Billy Isaacs "pointed to

Dungee as the man who murdered Mary Alday in a wooded area about six miles north of the mobile home." In the concluding paragraph of the article, court officials were reported as having stated that the evidence to be presented against Dungee was "almost identical" to that in Carl Isaacs' trial.

A front-page headline in the January 7 edition of *The Albany Herald* read "Selection of Dungee Jury Begins in Slay Trial Today." The article began by noting that jury selection in George Dungee's trial was set to begin that day. This article also described Billy Isaacs' testimony the previous week as "the most damaging testimony" presented against his brother, Carl Isaacs. The article described Billy Isaacs' testimony as painting a "chilling picture" of the slayings. According to the article, Billy Isaacs "told of seeing Mary Alday raped inside the trailer and later in a wooded area some miles away where her body was found." The article stated that "[s]he was shot to death by Dungee." The concluding portion of the article reminded readers that "[t]he elder Isaacs, Dungee and Coleman are all escapees from a Maryland prison farm."

Another article in the January 7 edition of *The Albany Herald* was headlined "Mother Says Her Sons 'Deserve Punishment.' "[6] The article told how Mrs. Betty Coleman Isaacs has "little sympathy left for her sons and hasn't bothered to answer their letters since they were jailed in Georgia." Mrs. Isaacs was quoted as stating that her sons "deserve whatever punishment they receive," and that they "had no right to hurt those people down there." According to the article, Billy Isaacs' testimony "pictured Carl as a merciless killer in his eyewitness description of the killings." The article also stated that Billy's testimony

"also implicated his and Carl's half-brother, Wayne Coleman, 26, and George Dungee, 35." This article also reminded readers that Carl Isaacs, Wayne Coleman, and George Dungee were escapees from a Maryland prison.

The January 8 edition of *The Albany Herald* contained a front-page headline "Prosecution to Offer 'Confession' of Dungee," and was accompanied by a picture of several jurors leaving the courthouse. The article described how special prosecutor Geer planned to introduce a confession by George Dungee in his trial. The article also noted that defense attorneys planned to object to the introduction of the confession. This article indicated that Billy Isaacs' "chilling testimony was instrumental in the guilty verdict and death sentence given his 19-year-old brother Carl Isaacs at the conclusion of a sensational trial last week." The article indicated that Billy Isaacs was also expected to testify for the prosecution in George Dungee's trial. Finally, the article noted that petitioner Coleman was still awaiting trial and that he "has also been implicated in the slaying of a 19-year-old Pennsylvania youth, Richard Miller."

The front-page headline in the January 9 edition of *The Albany Herald* read "Dungee Found Guilty of Six Murder Counts." The article was accompanied by a picture of Bud Alday, and another picture of Dungee. The article began by noting that George Dungee had also been found guilty and sentenced to death. The article referred to the special prosecutor's closing argument in which he waved "Mary Alday's turquoise pantsuit and bra, which were found near her nude body." According to the article, Billy Isaacs "told the Dungee jury the same harrowing eyewitness account of the murders he related last week in

his brother's trial." After Mary Alday was raped by Carl Isaacs and Coleman in the kitchen, and when she was taken into the woods, Dungee asked, "What about me?" The article then quoted Billy Isaacs' testimony stating that Dungee "took her into the woods, shot her twice and was getting ready to shoot her a third time," when the others stated, "That's enough."

In the January 10 edition of *The Albany Herald,* a front-page headline read "Coleman Goes on Trial Monday." The article described how Carl Coleman and George Dungee had already been found guilty and sentenced to death. The article again noted that Billy Isaacs "was the state's most damaging witness."

In another front-page article in the January 10 edition of *The Albany Herald,* an attorney for George Dungee discussed his personal opposition to capital punishment — "it is not good for society" — and stated that his closing argument during the sentencing phase was easier because of his opposition to the death penalty. The article contained a full summary of the attorney's argument opposing capital punishment, based on religious and historical grounds.

In the January 10 issue, at page 6A, there was an article based on an interview with Dungee's mother, after she learned of his scheduled execution, which was favorable to Dungee, tending to humanize him.

A front-page headline in the Sunday January 13 edition of *The Albany Herald* read "Difficult Task Foreseen Picking Last Murder Jury." The article appeared below a picture of Coleman peering from behind bars. The article began by noting that petitioner Coleman's trial was set to begin the next day and stated that attorneys expected

jury selection to be a difficult task. This article also noted Billy Isaacs' testimony in the previous trials and stated that the "younger Isaacs said that Coleman and Isaacs killed Ned, 62; his three sons, Jerry, 35, Chester, 32, and Jimmy, 25; and his brother, Aubrey, 57, at the trailer."

The Dothan Eagle also published numerous reports about the Alday case; it had a daily circulation of 315 in Seminole County.

In the May 15 edition of *The Dothan Eagle*, front-page headlines read "6 Members of Alday Family Slain in Seminole County. Five Men, Woman Shot 'Face Down.' " The article described how the six members of the Alday family were systematically executed the previous day.

The May 16 edition of *The Dothan Eagle* contained the front-page headline "Four Being Sought in Grisly Slayings Near Donalsonville. 3 Believed Maryland Escapees." The article began by noting that three of the four suspects in the killings were escapees from a Maryland prison. One escapee was quoted as stating that he would "kill any policeman who tries to stop us for any reason." The article noted the possibility that Pennsylvania youth Richard Miller was the seventh victim of the killers. The article also indicated that at the time of his escape, Carl Isaacs was serving a four-year sentence for breaking and entering and robbery, that Coleman was serving a ten-year sentence for armed robbery, and Dungee an eighteen-month sentence for contempt of court. The suspects' mug shots accompanied the front page article. The article also quoted William Beardsley, Director of the Georgia Department of Investigation, as stating that circumstantial evidence against the four suspects was "overpowering," and that "[t]here's no point in looking for anybody else."

A front-page headline in the May 17 edition of *The Dothan Eagle* read "Mrs. Alday's Car Found in Alabama; Manhunt Goes On." The article was accompanied by a photograph of Carl Isaacs which was captioned "Carl Isaacs. Fingerprints Found . . . ." The article reported that Mrs. Mary Alday's automobile had been found in Livingston, Alabama. The article also indicated that a fingerprint found at the scene of the crime had been identified as belonging to Carl Isaacs and identified Isaacs as an escapee from a Maryland prison. Georgia Department of Investigation Director William Beardsley was quoted as stating that "[t]his confirms our feeling on the subject." The article then repeated Beardley's quote from the previous day stating that circumstantial evidence against the four was "overpowering," and that "[t]here's no point in looking for anybody else." The article also noted that Mrs. Mary Alday had been raped and tortured before she was shot to death in the back of the head.

The May 18 edition of *The Dothan Eagle* contained the front-page headline "4 Sought in Alday Slayings Caught. Trio Found Asleep, One Nabbed Earlier." The article indicated that the four suspects were captured when police put up "a roadblock to stop four men who robbed a grocery store across the border in Virginia." According to the article, Sheriff White said the four would not be jailed in Seminole County "because of ill feeling among the residents of the rural community." The article quoted Sheriff White as stating:

> They will be jailed outside of Seminole County. I have an obligation to protect everybody. I want them brought to court. I want them brought to justice.

The article concluded by noting that the suspects were escapees from a Maryland prison and also stated that police expected to question the four in connection with the disappearance of Pennsylvania youth Richard Miller. Another front page article described the funeral for the victims which had taken place the previous day.

A front-page headline in the May 20 edition of *The Dothan Eagle* read "Alday Slayers Have Appointment with Justice." The article began by noting that the "cold-blooded trail of a quartet of confessed killers leads to Seminole County again tomorrow, one week after the bullet-riddled bodies of six Alday family members were left in the South Georgia county." The article described how on the previous Monday the killers "probably saw Mary Alday open the trunk of her 1970 blue and white Chevrolet Impala automobile to let a bag boy put a couple sacks of groceries in for her." The article then stated, "[t]hey [the suspects] must have liked the looks of the car. They liked the looks of its driver." The article described how authorities found Pennsylvania youth Richard Miller's automobile near the body of Mary Alday and subsequently found some of Miller's personal effects in the trunk of Ms. Alday's stolen car, which was located in Livingston, Alabama. According to the article, this led officials to "presum[e] there must also be a victim No. 7." According to the article, the four suspects got as far north as Slate Creek, Virginia, where "they gave out of money" and "found an easy mark—a Slate Creek grocery store—and robbed it of about $3000 and several guns." The article further stated that "Coleman, under questioning by the FBI at Bluefield, admitted killing the 19-year-old McConnellsburg youth." The article then stated:

> The admission confirmed authorities' worst fears. Miller was dead.
>
> Other victims? Ms. Mary Aldays' mother had died several hours earlier in a Colquitt, Ga., hospital after suffering a heart attack.
>
> . . .
>
> Pennsylvania authorities want to question them [the suspects] concerning the death of Mrs. Anne Elder, fifty-eight, of Stewartstown, Pa., last January. Police said that a short time before her death she had befriended Carl and William Isaacs when their car broke down near her home.
>
> This, authorities say, could bring the number of victims to eight, or nine if Mrs. Alday's mother is counted.

A front-page headline in the May 21 edition of *The Dothan Eagle* read "Alday Massacre. Accused Facing Six Counts Each." The article began by indicating that each of the suspects was charged with six counts of murder. The article also stated that during their arraignment. "Coleman agreed to carry authorities to a spot near Hagerstown, Md., and show them the body of a seventh victim."

The May 22 edition of *The Dothan Eagle* contained the front-page pictures of Coleman and Dungee and a headline "Alday Massacre Four Wait; One Helps Hunt Seventh Body." The article began by noting that Coleman had been taken to Pennsylvania to assist in the search for a Pennsylvania youth, Richard Miller. According to the article, "Coleman, who is said to be the ring leader, reportedly has admitted shooting 19-year-old Richard Wayne Miller of McConnellsburg." The article then described

the committal hearings held for the four and stated that petitioner Coleman "seemed to smirk and smile when the district attorney asked if he understood each of the charges against him." The article also noted that Peter Zack Geer, former Lieutenant Governor of Georgia, would assist in the prosecution of the case. According to special prosecutor Geer, he had represented the Aldays on numerous occasions and had hunted and fished with two of the victims.

The May 23 edition of *The Dothan Eagle* contained a front-page article entitled "New Link Forged in Alday Massacre." The article reported that "[a]uthorities in McFarlan, N.C., told Seminole County Sheriff Dan White the four men charged with the slayings robbed a grocery store near there the Wednesday before the Aldays were killed." The article also described how Coleman had been taken to Pennsylvania to assist in the search for the body of Richard Miller. According to the article, the "FBI said Coleman . . . told agents of Miller's death."

A front-page article in the May 24 edition of *The Dothan Eagle* was headlined "Alday Killers Could Get Electric Chair in Georgia." The article began by noting that if convicted, the four suspects in the Alday case could face the death penalty. The article then described how three of the four suspects were escapees from a Maryland prison. The article then listed the ten aggravating circumstances which, under the Georgia statute, might justify the imposition of the death penalty.

In the May 25 edition of *The Dothan Eagle* front-page headlines read "The Alday Case. Webb Appointed But Desires 'Off.'" In the article, Webb articulated two

reasons for his desire to be excused from the appointment. According to Webb, his sponsorship of the state's new death penalty law would preclude him from challenging it during the trials. Speaking of the possibility of his defending one of the accused, Webb stated "I believe I can't in good conscience—personally and professionally—because those people were neighbors and personal friends of mine." Another attorney, speaking of his appointment, stated "I've objected. I objected at the time Judge Geer called me. But as far as I'm concerned, I've been appointed. I will give him the very best that I have. I have that ethical and legal obligation." The article also quoted Attorney J. Willis Conger as stating:

> I'd like very much to be relieved. I don't know of any lawyer in Georgia who would want that case. I don't know of anybody who would want it.
>
> I feel the feeling in Seminole County and this part of Georgia is such that I don't want it. It's not the kind of case I want to get involved in. Right now, I plan to ask to be relieved.

A front-page headline in the June 4 edition of *The Dothan Eagle* read "Alday Case. Body of Youth Found in Maryland." The first sentence of the article stated that "[t]he body of Richard Wayne Miller, 19-year-old McConnellsburg, Pa., youth whose disappearance May 10 had been traced to four men charged with the massacre of six members of the Ned Alday family, was found yesterday about eight miles south of Flintstone, Md." The article described petitioner Coleman as "another of the suspected Alday slayers who FBI spokesman said has admitted killing Miller." The article concluded by naming the four suspects and noting the fact that three of the four were escapees from a Maryland prison.

An article in the June 14 edition of *The Dothan Eagle* was headlined "Alday Case Seen as Death Law Test."[7] The article began by noting that the Alday case "may become a test case for Georgia's new capital punishment law." Carl Isaacs' attorney, Bobby Hill, was quoted as stating that "[i]t is the kind of murder case that the legislature obviously intended for the new death penalty to be applied in." Hill and Farrington were further quoted as stating that one of the reasons they volunteered was because "there was just nobody who was willing to give them the kind of defense they are entitled to under our system of law." A concluding paragraph in the article noted that three of the defendants escaped from a Maryland prison farm just before the slayings.

A front-page article in the July 6 edition of *The Dothan Eagle* was headlined "Closed Hearing Plea Made in Alday Case." Except for a brief recapitulation of the facts of the crime, the article merely described procedural maneuverings in the case. A similar front page article appeared in the July 19 edition of *The Dothan Eagle* although this article did note that each of the victims was shot in the back of the head, and that Mrs. Mary Alday had been raped.

Another front-page article in the July 22 edition of *The Dothan Eagle* was captioned "Isaacs to Await Grand Jury Action." The article began by noting that defendant Carl Isaacs was bound over for action to the Seminole County Grand Jury. The article was primarily a factual account of the proceedings surrounding Isaacs' committal hearing although the article did state that "[i]n addition to the six charges against the Isaacs, Coleman and Dungee, they are charged with the death of Rich-

ard Wayne Miller, 19, of McConnellsburg, Penn., whose car was found near the body of Mrs. Mary Alday."

A front-page article in the August 8 edition of *The Dothan Eagle* was captioned "3 Have Hearings in Alday Massacre." The article was a factual account of the committal hearings for the three remaining suspects and contained no prejudicial information. A similar article appeared on the August 9 front page.

A front-page article which appeared in the September 4 edition of *The Dothan Eagle* was headlined "Grand Jury Studying Alday Case." The article reported that the Seminole County Grand Jury was meeting to consider murder charges against the four suspects. The article named the four suspects and stated that three of the four were Maryland prison escapees. The article also stated that the "FBI said Coleman has also admitted killing Richard Wayne Miller, a 19-year-old high school senior from Pennsylvania."

In the September 18 edition of *The Dothan Eagle* the headline for an article read "Change of Venue Asked For Isaacs." The article briefly told how attorneys for defendant Carl Isaacs requested a change of venue for the upcoming trial. The article contained no prejudicial information other than extensive quotations from the previously referred to letter from the trial judge to the attorneys cautioning them not to "trifle with the court." A similar article captioned "Venue Change For Isaacs Is Sought," appeared in the September 26 edition of *The Dothan Eagle* but contained no prejudicial information.[8] The same is also true of a September 27 article which appeared on the front page of *The Dothan Eagle* which was captioned "Alday Case Judge Stays on Bench."

A front-page article in the September 28 edition of *The Dothan Eagle* was headlined "Court Studying Change of Venue." The article gave a brief summary of the arguments presented at the change of venue hearing. The article also recounted how defense attorneys sought discovery of all favorable evidence held by the prosecution. According to the article, special prosecutor Geer stated that he had no objections to surrendering the favorable evidence but he was quoted as stating that "I must say that it ain't much."[9]

In May of 1973, *The Atlanta Journal* had a daily circulation of 106 in Seminole County. The daily circulation of *The Atlanta Constitution* in Seminole County was 178, with the Sunday paper circulation being 563.

The May 15 edition of *The Atlanta Journal*[10] contained an article captioned "Killers Strike at Mobile Home."[11] The article was primarily a factual account of the scene of the crime.

An article which appeared on page 1A of the May 16 edition of *The Atlanta Constitution* was headlined "Slayings Leave Town in Shock." The first sentence of the article quoted a local resident as stating, "Six Murders in Donalsonville, Ga. That's something that happens in California, not a little town like this. It's unbelievable!" The article went on to describe how local residents held members of the Alday family in high esteem. However, the article contained no prejudicial information concerning the defendants.

In an article which appeared on the front page of the May 16 edition of *The Atlanta Journal*, a local resident "summed up the feelings" of the residents of Seminole

County when he stated: "I feel sorry for them fellows if they get caught around here, I don't think they'll make it to jail." According to the article, "[f]eeling in the shocked community tended towards the theory that outsiders, like the three convicts who are suspected, must have done the killing." One woman was quoted as stating, "[t]hey're like animals. No one around here would even want to do something like that."

Another article which appeared on the front page of the May 16 edition of *The Atlanta Journal* was headlined "Few Slayings in Georgia Out-Total Seminole's Six." The article began by noting that the slaying of the Alday family members was Georgia's second largest mass murder. The article then described other mass murders which had taken place in the past within Georgia.

In an article which appeared on page 1A of the May 16 edition of *The Atlanta Constitution*, Dr. Larry Howard, director of the state crime lab, was quoted as stating that the Alday murders were the "biggest deliberately planned homicide in Georgia." The article then noted that three of the four suspects were escapees from a Maryland prison.

An article which appeared on page 1A of the May 17 edition of *The Atlanta Journal* described how Mrs. Mary Alday's automobile had been found in Livingston, Alabama. The article stated that three escapees from a Maryland work camp and the brother of one of the escapees were "prime suspects" in the mass slaying. The article also stated that a "fingerprint found on a window of an abandoned car near the raped and shot body of Mrs. Alday has positively been identified as belonging to Carl Isaacs,

one of the hunted suspects." The article also implied that the four might be involved with the disappearance of a Pennsylvania youth, Richard W. Miller. In the article, Gil Kelley, radio station owner and a member of the Seminole County Grand Jury, stated that "[i]f a report came now that these men were holed up in a wooded area, I don't think any of them would get out alive." Nonetheless, Kelley maintained that if the four were captured, they would receive a fair trial in Donalsonville. Sheriff Dan White, referring to the gruesome manner in which Mrs. Alday was killed, stated that the killers were "animals and should be treated as such," and were "lower than a dog. " Sheriff White asked, "[C]an you name me any animal that doesn't protect its females?" Sheriff White further stated:

> If I had my way about it, I would have me a large oven and I'd pre-cook them several days, just keep them alive and let them punish. And I don't think that would satisfy me.
>
> . . .
>
> It's not my job to prejudge the case, let's leave it to the court and the jury do that.

An accompanying article appeared in the May 17 edition of *The Atlanta Journal* and quoted Ms. Betty Isaacs as stating "Respect is what my sons lacked. They had none for their family and those people in Georgia and how can they expect any from us?"

A front-page headline of the May 18 edition of *The Atlanta Journal* read "Grieving Donalsonville Relieved by Captures." The article began by describing the sense of relief felt by the citizens of Donalsonville upon learning

of the capture of the four suspects. Gil Kelley, a radio station owner and a member of the county grand jury, was quoted as stating that the "killers should be put away from society" because "[w]ith a death sentence there would be so many appeals it could be watered down, and they might get out in seven years. We don't want that." However, Tuddy Alday, a son of Everett "Bud" Alday, expressed his desire for a harsher penalty and stated, "I think the killers ought to be killed." When asked whether a fair trial was possible in Seminole County, Mr. Alday said, "[t]hey'll get a fair trial but they don't deserve it for what they done." The article concluded with a quotation from Sheriff White on the possibility of trial taking place elsewhere. He stated:

> There's blood boiling all over the nation about this. You name me a state where if they [the captured suspects] broke loose, people wouldn't want to hurt them.
>
> There's no other place for it [the trial] to be held except in Seminole County.

An article on page 1A of the May 18 edition of *The Atlanta Constitution* described the manhunt in the West Virginia mountains for three of the fugitives. The article told how George Dungee had been apprehended the previous evening. The article then described the manhunt which was taking place for the remaining fugitives. Seminole County Sheriff Dan White was quoted as stating that "[t]hey [the suspects] were running, just like I figured. They're too cowardly to fight." The article also quoted Mrs. Betty Isaacs as stating that her sons were "old enough to know right from wrong and deserve what they get when captured." The article also indicated that

the four were suspected in the murder of a Pennsylvania youth.

Another front-page article in the May 18 edition of *The Atlanta Constitution* described the funeral which was held for the six victims. According to the article, the funeral was the biggest in Seminole County history. The article also indicated that dignitaries attending the funeral included Mrs. Lillian Carter, mother of Governor Jimmy Carter; State Agriculture Commissioner Tommy Irwin; Department of Transportation Chairman Hugh Broome; State Senator Julian Webb; and Cloyd Hall, a special assistant to Governor Carter. The article specifically noted, however, that none of the ministers speaking at the funeral called for revenge for the murders.

Another article which appeared in the May 18 edition of *The Atlanta Journal* reported how Maryland prison authorities described the four suspects as having histories of unstable family life, repeated burglaries, excessive drinking, and frequent escape. According to the article, two of the suspects "have been involved with homosexuality." The article described how petitioner Coleman was the only one of the four with a record of violence in the past. The article told how he was serving a ten-year sentence for armed robbery when he escaped. The article concluded by giving a detailed arrest record for each of the four suspects.

Another article which appeared in the May 18 edition of *The Atlanta Journal* described the arrest of the four suspects in West Virginia. The article was primarily a factual account of the suspects' arrest.

Finally, a third article which appeared in the May 18 edition of *The Atlanta Journal* described the funeral for

the victims. The only reference to the four suspects came when one minister prayed for God's mercy on "everyone of these men who had anything to do with this destruction . . . we hope that before they close their eyes in death they will see themselves for what they are."

A front-page headline in the May 19 edition of *The Atlanta Constitution* read "Suspects in Alday Killings Brought Back to Georgia." The article described how the three remaining suspects had been apprehended in the mountains of West Virginia and how they were brought back to Georgia. Colonel Ray Pope, Director of Public Safety, was quoted as stating that the killings were the "most horrifying crime that has ever been committed in our state." Another Department of Investigation official stated that the "climate in Seminole County is not conducive to keeping them [the suspects] in the jail there." Sheriff White was also quoted as stating that "[t]here's not a doubt in my mind that lynching has crossed the mind of everybody. I'd like to try 'em in court this afternoon if I had them down there." Nonetheless, although Sheriff White stated that "everybody's blood is boiling," he maintained that the suspects could still get a fair trial in Seminole County. He stated:

> We believe in God. We believe in law and order. And we want the court to have a chance to show the world that we will deal out justice. All we want is to see justice done.

The article also indicated that three of the four suspects were escapees from a Maryland prison, that fingerprints of two of the suspects had "definitely been found at the scene of the crime in Seminole County," and that "FBI agents Friday night said that, under questioning in Blue-

field, W.Va., Friday, Coleman told about the death of Miller, a high school senior who has been missing since May 10."

An article which appeared in the May 19 edition of *The Atlanta Constitution* was captioned "Alday Slay Suspects Awake in 'Disbelief.'" The article described how West Virginia state police used a bloodhound to track the suspects in the mountains of West Virginia.

A front-page article in the May 19 edition of *The Atlanta Journal* contained the headline "Men Held Separately in Atlanta Area Jails." The article began by describing how the suspects had been brought back to Georgia. In the article, FBI agents stated that Coleman confessed to killing Pennsylvania youth Richard Miller, "because I didn't want any witnesses." According to the article, "FBI agent Robert D. Warden of Bluefield, W.Va., described Coleman as 'a cool customer who displayed no emotion' as he told authorities how he dragged Miller from his car in a deserted area and pumped a bullet into him." The article then described how the most damaging statement came from Dungee. The article noted that "while officials wouldn't disclose the statement's contents, there were indications Dungee named Coleman for the alleged murder of Mrs. Mary Alday." Dungee was quoted as stating, "I didn't kill that woman down there in Alabama. It was Coleman who did that." The article then indicated that Dungee was simply confused about where he had been in describing the crime as taking place in Alabama. The article concluded by noting that the arrest of the four suspects came after the "four wanted men allegedly robbed a store in Slate Creek, Va."

An article in the Sunday May 20 edition of *The Atlanta Journal and Constitution* contained the headline "Alday Death Suspects Move Monday to Donalsonville." The article began by describing how authorities planned to take the four suspects to Seminole County. When asked whether the suspects would be provided sufficient security in the community, William Beardsley, Director of the Georgia Division of Investigation, stated, "I've seen the people in Donalsonville and heard the rumors about mob violence. I don't believe there are those kind of people down there." The article also discussed the disappearance of Pennsylvania youth Richard Miller, and described how petitioner Coleman reportedly told an FBI agent that Miller was killed "because I didn't want any witnesses." At the conclusion of the article, Coleman's quote admitting the murder of Miller was repeated.

In another article which appeared in the May 20 edition of *The Atlanta Journal and Constitution*, the headline read "Aldays, Suspects Contrast. Lived in Worlds Apart." The article simply contrasted the lifestyles of the victims with that of the four suspects. The article described the victims as "hardworking, nondrinking, and religious." In contrast, the four suspects were described as "drifters, in and out of trouble most of their lives." According to the article, the suspects had "a reputation for breaking the law." The article reminded readers that three of the four suspects were escapees from a Maryland prison. The article concluded by quoting Mrs. Betty Isaacs as stating that "when they [the Issacs-Coleman brothers] began to grow up they would just stand in front of me and laugh in my face."

An article on page 1A of the May 21 edition of *The Atlanta Journal* was captioned "Suspects Hear Slay Charges." The article began by describing the hearing in which the four suspects were informed of the charges against them. The article also indicated that former Lieutenant Governor Peter Zack Geer had been retained by the Alday family as a special prosecutor in the case. The article described Geer as an "old friend of the Alday family." The article also described local reaction as "decidedly angry toward the suspects." The article concluded by noting that authorities said petitioner Coleman "admitted that he shot and killed Richard W. Miller, 19, of McConnellsburg, Pa."

A front-page article in the May 22 edition of *The Atlanta Constitution* was headlined "Alday Suspects are Charged." The article described petitioner Coleman as a "frail prison escapee with a scraggly mustache and beard" and indicated that he "smirked and smiled repeatedly while asked by Dist. Atty. Ralph Foster if he understood each of the six charges against him." The article also described how former Lieutenant Governor Peter Zack Geer, a longtime friend of the Alday family, had been retained by the family as a special prosecutor in the case. The article noted that immediately after the hearing, petitioner Coleman was taken to Pennsylvania to help in the search for the body of Richard Miller, "whom Coleman has reportedly confessed to murdering." The article also mentioned some speculation circulating concerning possible revenge against the suspects and noted that one surviving family member stated that any such possibility would "be very much against the family will." The article then discussed special prosecutor Peter Zack Geer and specifically noted that he was retained by the family and would be paid by

the family rather than the state for his efforts in acting as special prosecutor in the case. The final paragraph of the article noted that petitioner Coleman "repeatedly smiled or smirked and sometimes seemed amused by the legal proceedings."

An article which appeared in the May 23 edition of *The Atlanta Journal* was headlined "Alday Suspect Fails to Find Slain Victim." The article described how petitioner Coleman had been "unable or unwilling" to locate the body of Pennsylvania youth Richard Miller. According to the article, "[a]uthorities contend Coleman admit[ted] [killing] Miller because 'they didn't want any witnesses.'" In the concluding portion of the article, Sheriff Dan White discounted the possibility of mob violence and stated that "[t]he people of Seminole County want them brought to court and true evidence presented before a jury that will deal with them fairly."

A similar article appeared in the May 23 edition of *The Atlanta Constitution* and noted that officials had had no success in their attempt to find the body of Pennsylvania youth Richard Miller. The article described how petitioner Coleman assisted authorities in looking for the body and noted that Coleman "admitted killing Miller on May 10, a few days after he and two of the other suspects escaped from the Wicomico Prison Farm on Maryland's Eastern Shore." The article again described how Coleman told authorities Miller was killed because they "didn't want any witnesses." Similar articles appeared in the May 23 edition of *The Atlanta Journal* and the May 24 edition of *The Atlanta Constitution*.

A May 24 article in *The Atlanta Constitution* was headlined "Sheriff Sees No Violence Over Slaying of the Aldays." According to the article, Sheriff Dan White "bragged on the lack of violent reaction in his county." Sheriff White stated:

> My people don't want violence, and I'm in a position to know. We're all neighbors and we love one another. All we ask for is a fair and impartial trial with a good jury that would give justice. We can get just as fair a jury in Seminole County as any county in the nation. I don't think that—I know it.

According to Sheriff White, the suspects were not being held in the Seminole County Jail because it is "not secure enough—and that's the only reason."

An article in the May 24 edition of *The Atlanta Journal* was headlined "Attorneys Named for Alday Suspects." The article described how the trial judge had named two defense attorneys to represent the accused in the case. The article also described how the search for the body of Pennsylvania youth Richard Miller had been unsuccessful. The article concluded by noting that "[d]espite the fruitless seach, authorities are certain Miller was killed by the suspects; they contend Coleman admitted killing the Pennsylvanian."

In the May 25 edition of *The Atlanta Journal*, an article was captioned "Attorneys Regret Alday Case Duty." The article began by noting that the reactions of eight attorneys who had been appointed to represent the defendants ranged from "extreme reluctance" to "dismay." Attorney Willis Conger was quoted as stating "I despise it, I'd rather take a whipping, but the judge appointed me and I have to do my job." Another attorney, Harold Lam-

bert, was quoted as stating, "Based on what I've heard and read, I had reservations whether I could objectively give the defendant the type of defense to which he is entitled. I'm unhappy, I wish this would pass, as they say, but it didn't and I have a legal and ethical obligation to defend this defendant."

The headline for a May 25 article in *The Atlanta Journal* read "Alday Slay Suspect Lawyers Want Out." The article began by describing how two attorneys appointed to represent the suspects have asked to be relieved of their appointments. Attorney Harold Lambert was quoted as stating that the appointment was "the worst thing that's ever happened to me." Attorney Willis Conger stated, "I've done everything I can to get out of it. It's worse than a dose of Colomel [a laxative] but I have to take it. To refuse would be contempt of court." Attorney Lambert was further quoted as stating that if he was not relieved of the appointment, "because of my ethical and legal obligations to the Bar of Georgia, I will do what I have to do."

In an article on page 6B of the May 26 edition of *The Atlanta Constitution*, the headline read "Alday Suspect Lawyer Declines. State Sen. Webb." In the article, State Senator Julian Webb described how he declined to take the case because the state's new death penalty law which he sponsored would likely be challenged and because of his close personal relationship with the victims. Webb was quoted as stating, "I believe I can't in good conscience—personally and professionally—because those people were neighbors and personal friends of mine." The article also told how appointed defense attorney Willis Conger also

wished to be relieved of the appointment. Conger was quoted as stating, "I'd very much like to be relieved. I don't know of any lawyer in Georgia who would want this case. . . . I feel the feeling in Seminole County and this part of Georgia is such that I don't want it."

Headlines for a front-page article in the May 29 edition of *The Atlanta Constitution* read "Alday Suspects. 'Got to be Punished,' Mother Says." In the article, Ms. Betty Isaacs was quoted as stating that "[t]here's no way out, they got to be punished. I'm honest about it. It's hard, but that's the way I feel." The article indicated that petitioner Coleman was serving a ten-year sentence for armed robbery when he and his half-brother Carl Isaacs escaped from a Maryland prison. According to the article, Coleman's armed robbery was the only violent crime for which any of the brothers had been convicted, but all had been "moderately to heavily" involved in illegal activities before their recent escapes.

An article which was somewhat favorable to petitioner Dungee appeared in the May 30 edition of *The Atlanta Constitution*. The article described how Dungee had been regarded as "a safe bet for a minimum security prison." The article generally described his background and quoted a former girlfriend as stating that "[h]e was nice."

In an article which appeared in the May 31 edition of *The Atlanta Constitution*, the headline read "Police Were 15 Minutes Away From Alday Suspects." In the article, a Maryland official described how teletypes were sent out several days before the Georgia slayings warning law enforcement officers about the fugitives. The article

described how the official had persuaded a Baltimore newspaper to publish photographs of the four suspects to seek new leads on their whereabouts. The photographs, however, appeared the day after the Donalsonville murders. According to the detective, "By that time, all hell had broken loose. We were trying to alert everyone we could, but you can't alert a whole nation. It could have been a small town anywhere." The article described how "[a]fter their escape, the trio from Poplar Hill joined the younger Isaacs and embarked on a crime spree in suburban Baltimore County that allegedly included gun thefts and auto larcenies." The article also noted that police said that petitioner Coleman admitted killing Pennsylvania youth Richard Miller. When asked whether petitioner Coleman showed any remorse during his search for the Pennsylvania youth's body, a police spokesman replied, "I didn't notice any." The article also indicated that Carl and Billy Isaacs were under investigation for the slaying of a former Baltimore socialite who reportedly gave the Isaacs a lift last November when their car broke down. According to the article, police "theorized the Isaacs may have linked . . . [the woman] to their arrest and sought revenge."

In a June 4 article which appeared in *The Atlanta Constitution*, the headline read "Police in Maryland Find Body in Slay Victim Hunt." The article began by reporting that the body of slain youth Richard Miller had been found in Maryland. The article continued, noting that "Wayne Coleman, 26, a fugitive from a Maryland prison farm and one of four men charged with the Alday mass murder, has reportedly confessed to authorities that he and his three companions shot and killed Miller May 10 after commandeering the victim's car near McConnells-

burg." The article again quoted Coleman's statement in which he admitted killing Miller because "they didn't want any witnesses." The article concluded by noting that no one has yet been charged in Miller's murder. A similar article appeared in the June 4 edition of *The Atlanta Journal*. That article noted that Miller "was slain with a gunshot wound in the back of the head, the same method used to kill the Georgia victims." The article did not, however, mention Coleman's alleged confession in connection with the discovery of the body.

An article which appeared in the June 4 edition of *The Atlanta Constitution* was captioned "Slaying of Aldays Arouses the Nation." The first sentence in the article recounted how Seminole County Sheriff Dan White had received numerous letters and telephone calls "from angry people who want to see those boys punished." White was also quoted as stating that some of the letters said "[g]ive them the chair." White further noted that most of the people expressed anger over the murders and stated that "[i]t seems like people in Seminole County are not any madder than people all over the country." When the possibility of a change of venue was discussed, White stated "[t]he way I feel about it is that the boys are charged with committing crimes in this county so their trials shouldn't be held in another county." According to White, local residents were "just waiting for the court to do its job." The final sentence in the article noted that there had been no direct threats on the suspects' lives.

Headlines from an article in the June 11 edition of *The Atlanta Constitution* read "Maryland in No Hurry for 4 Alday Suspects." In the article, a Maryland prosecu-

tor stated that he would wait until the October grand jury term to seek indictments against the four suspects in connection with the murder of Richard Miller because the men were already in custody in Georgia on murder charges.

A June 13 article in *The Atlanta Journal* was titled "Bobby Hill Joins Defense of Suspect in Alday Case." The article indicated that attorneys Hill and Farrington had been named to replace attorneys Conger and Taylor who had asked to be dropped from the case. Speaking of the Alday murders, attorney Hill stated that the case was "certainly the kind of activity on which the legislature intended to have the death penalty imposed." The article also noted that one of Isaacs' previous attorneys, Conger, cited the proximity of his practice to Donalsonville and his business dealings with the Alday family as justification for his efforts to withdraw from the case.

An article which appeared in the June 14 issue of *The Atlanta Constitution* contained the headline "Alday Case Top Death Law Test." In the first paragraph of the article, attorney Bobby Hill described the Alday case as a "prime test for Georgia's new death penalty law." Hill further stated that "[i]t is the kind of murder case that the legislature obviously intended for the new death penalty to be applied in." Hill also noted that another reason he volunteered to defend Isaacs was because "there just was nobody who was willing to give them the kind of defense they are entitled to under our system of law."

An article which appeared in the June 18 edition of *The Atlanta Constitution* was headlined "Fire Destroys Store Alday Trio Robbed." The article briefly recounted how fire had destroyed a grocery store "where a robbery

May 17 led to the capture of four men charged in the slayings of six members of a Georgia family.

An article in the August 8 edition of *The Atlanta Journal* described a committal hearing for three of the four suspects. The article generally contained no prejudicial information, except the article did note that Coleman, Dungee, and Carl Isaacs were escapes from a Maryland prison. This is also true of an article headlined "Grand Jury Next in Alday Case" in the August 9 edition of *The Atlanta Journal* which described how three of the suspects had been bound over for action by the grand jury. A similar article appeared in the August 9 edition of *The Atlanta Constitution* under the headline "3 in Alday Slayings Bound Over," but the article reported that petitioner Coleman "reportedly admitted that he shot [Pennsylvania youth] Miller" as well as noting that he, Dungee, and Carl Isaacs were escapees from a Maryland prison. An October 10 article appearing in *The Atlanta Constitution* entitled "Trial Set Dec. 31 in Alday Case" described how the trial judge had set trial to begin on December 31, 1973, and it also noted that three of the four men indicted by the grand jury were escapees from a Maryland prison. Other articles which reported procedural maneuverings in the case also indicated that three of the four suspects were escapees from a Maryland prison. *See* "Alday Slay Suspect, 16, Refused Juvenile Trial," Atlanta Journal, Oct. 2, 1973; "Trial Shift Denied in Alday Case," Atlanta Journal, Oct. 11, 1973; "Alday Case Trial Order Not Known," Atlanta Journal, Dec. 19, 1973. Another article appeared in what is apparently the December 23, Sunday edition of *The Atlanta Constitution* and was headlined "Boy, 16, Gets 40 Years in Alday Case." The article began by de-

scribing how Billy Isaacs received a 40-year sentence upon entry of his guilty pleas to charges or burglary and armed robbery. According to the article, Billy Isaacs was "expected to be a key witness for the prosecution, according to a reliable source." This article also noted that the three remaining suspects were escapees from a Maryland prison.

An article which appeared in the December 31 edition of *The Atlanta Journal* was headlined "Trial Jury Sought in Alday Slayings." The article began by describing how the process of jury selection had begun in Carl Isaacs' trial. This article noted that the three suspects were arrested following a holdup at a country store in Virginia, that Coleman had admitted shooting Pennsylvania youth Richard Miller, and that all three remaining suspects were escapees from a Maryland prison.

A December 31 article which appeared in *The Atlanta Constitution* was headlined "Alday Jury Selection Press Ban." The article described how the press had been barred from the courtroom during the process of jury selection. The article also described the other precautions taken by the trial judge to keep certain equipment used by the press outside the courtroom. In addition, the article noted that Billy Isaacs had pleaded guilty to burglary and armed robbery and was "expected to testify against his brother and the other defendants."

The January 2 edition of *The Atlanta Constitution* contained a front-page article which was headlined, "Isaacs' Prints Found at Alday Slay Scenes." The article began by noting that Carl Isaacs' fingerprints had been found at the crime scene. The article also noted that

petitioner Coleman's fingerprints were also found on the car abandoned in the woods near where Mary Alday's body was found. The article recounted how a West Virginia state trooper testified that he took a wristwatch from Dungee that was identified by a family member as belonging to Mary Alday.

A front-page article in the January 4 edition of *The Atlanta Constitution* described how the jury had returned a guilty verdict in just over an hour and had sentenced defendant Carl Isaacs to death in the electric chair after another 38 mintues of deliberation. The article quoted extensively from closing arguments for prosecution and defense counsel. Another article in the January 4 edition of *The Atlanta Constitution* was headlined "Alday Family Hoped for Death Penalty, Speak Their Feelings." According to the article, one family member remarked "[s]o far so good" when the jury returned a guilty verdict in Carl Isaacs' case. According to the article, the relatives then started a waiting and hoping game—hoping that the seven women and five men on the Seminole County jury would come back with a death penalty for Carl. The article stated that the family "made no attempt to hide their feelings that Carl ought to be put to death for his part in killing six of their blood kin and viciously and repeatedly assaulting 26-year-old Mrs. Mary Alday." One family member was quoted as stating "[w]e would hope the jury would give him [Carl] everything they can. Whatever punishment he gets won't be enough." The article concluded by noting that "[w]hen the jury came back out with its death penalty verdict for Carl, after deliberating only 38 minutes, the wife of one of the Alday victims smiled broadly."

A front-page article in the January 4 edition of *The Atlanta Journal* described how the jury sentenced Carl Isaacs to death in the electric chair. The article noted that Billy Isaacs turned state's evidence in the case and stated that he "described Carl as the ringleader who shot three of the victims personally and laughed when one begged for mercy, and who directed the killings of the other three." The article also described how relatives of the victims appeared relieved or pleased when the death sentence was announced. The article quoted one family member who asked not to be identified as stating "I've said all the time they [the four suspects] would be found guilty and they'd be sentenced to death."

An article which appeared in the January 7 edition of *The Atlanta Journal* was headlined "Second Alday Jury Sought." The article indicated that the jury selection process was proceeding in George Dungee's case. According to the article, special prosecutor Geer planned to call the same witnesses who testified in the previous week's trial. The article stated that Billy Isaacs "testified that Dungee shot and killed Mary Alday after the young housewife was driven to a wooded clearing some miles from her husband's mobile home where the other family members were murdered."

A headline in the January 8 edition of *The Atlanta Constitution* read "Alday Slay Confession Disputed." The article described how defense attorneys for George Dungee planned to object to an alleged confession made by Dungee to the murder of six members of the Alday family. According to the article, Dungee's attorney "had discussed the possibility of changing Dungee's innocent plea to guilty but he said prosecutor Geer had 'objected'

to it." A similar article headlined "Second Trial on in Alday Killings," appeared in the January 8 edition of *The Atlanta Journal.* Another front page article in the January 8 edition of *The Atlanta Journal* was headlined "Testimony Places Dungee at Aldays?" The article reported that a Georgia law enforcement official had testified that fingerprints belonging to Dungee and the three other suspects were found at the crime scene. The article specifically stated that petitioner Coleman's fingerprints were found in the mobile home, in Mary Alday's automobile, and in a car stolen in Pennsylvania which was found near Ms. Alday's body.

The headline for a front-page article in the January 10 *Atlanta Constitution* read "Dungee Given Death in Slaying of Aldays." The article told how defendant George Dungee was found guilty and sentenced to death for his part in the slayings of the Alday family, and described briefly the closing arguments of both parties.

An article on page 8A of the January 10 edition of *The Atlanta Constitution* contained the headline "Plea Against Death Penalty Awes Lawyers." In the article, special prosectuor Geer praised the efforts of defense attorneys for George Dungee to avoid imposition of the death penalty in their closing argument. The article quoted extensively from portions of attorney Sheffield's closing argument.

Of the newspapers read by the residents of Seminole County, the *Bainbridge Post-Searchlight* probably had the least circulation in Seminole County. *See* Deposition of Waldo L. McLeod at 7. Two editorials from the May 17, 1973, edition of the *Bainbridge Post-Searchlight* merit dis-

cussion. One editorial, entitled "Corner the Mad Dog," stated:

> In the editorial parlance of early American newspapers, it was not uncommon for the editor to suggest that the perpetrator of a heinous crime "should be shot down like a dirty dog."
>
> We never liked that particular phrase, because even the meanest dogs we have ever known would in no way compare with the guilty person or persons who committed the violent, outrageous, atrocious, vicious, and beastly murders of six members of the Alday family in Seminole County sometime last Monday night.
>
> To make such a comparison would be speaking disparagingly of dogs in general, and they are more entitled to consideration than the maniac or maniacs who snuffed out the lives of six human beings, five men and one woman during the course of the evening and in addition, criminally assaulted the woman before she was killed. At least, the record shows she was criminally assaulted either before or after death.
>
> Fellow citizens, this is not Chicago or Hell's Kitchen. This happened in South Georgia. Even the Mafia would refrain from the magnitude of such a crime.
>
> A sex maniac is running free in our area. A mad dog is on the "loose."
>
> We are staunch believers in law and order, and we believe those who commit capital felonies should be brought before the bar of justice, but this is one case where we hope the guilty will resist arrest, and will be felled where they are cornered.
>
> We must find this criminal or criminals if we have to track them to the four corners of the world. We must bring the ghoul or ghouls to bay and the guilty must be removed from our society just as a dog with rabies is removed. Permanently.

Another editorial in the same edition of the *Bainbridge Post-Searchlight* was entitled, "A Case for Capital Punishment." The editorial stated:

> It is remarkable how anyone could be aware of atrocities such as the Alday murders and still contend that capital punishment is too harsh, that it has no place in modern society, or that it is not an effective deterrent to criminals.
>
> Three of the men who are suspected to have murdered the Aldays in an unhurried manner are escapees from a Maryland prison. . . .
>
> . . .
>
> When a man is convicted beyond a reasonable doubt of crimes such as the Alday killings, there is nothing else that can be done for him. It is ridiculous to accept the premise that he can be made to see the error of his ways. As long as he lives, he is a threat to society. If he is imprisoned, he has the opportunity for escape, and even for parole. If he is executed, society has nothing more to fear.

The September, 1973 issue of *Front Page Detective* contained an article entitled "Too Evil to Be Called Animals." The record indicates that at most 300-450 people purchased the September issue of *Front Page Detective.*[12] A sentence in large caption type which appeared on the first page of the article stated that the "beast who gunned down the five God-fearing Alday men and then sexually assaulted and slaughtered pretty Mary Alday were, in the words of a lawman, lower than dogs and they seemed determined to prove it." The article described how the bodies of the five Alday men were found in the trailer and indicated that Mary Alday "had been repeatedly raped and subjected to a hideous ordeal of sexual torture." According to the article, "[e]ven after death, there was

reason to believe, the killers had continued to violate the young woman's body." The article also noted that fingerprints found at the scene of the crime, and in an automobile belonging to a missing Pennsylvania youth had been positively identified as those of Coleman, Carl Isaacs, Billy Isaacs, and George Dungee. The article quoted Sheriff Dan White as stating:

> There's talk around here of lynching if they're found and brought back. The pitiful, pitiful thing about it is they might never be brought back. Those people will go some other place, commit crimes there and get convicted and never be brought back here for trial.
>
> Of course, if we get them back here, I think they'll be safe—not that I don't share the community's feelings that they're animals and should be treated as such. Actually, I would hesitate to call them animals. What are you going to compare them with. They're lower than a dog. You take that poor woman. They assaulted her, killed her, left her lying there nude. . . . Can you name me any animal that doesn't protect its females?
>
> If I had my way about it, I would have me a large oven and I'd pre-cook them several days, just keep them alive and let them punish. And I don't think that would satisfy me.
>
> But it's not my job to prejudge the case. Let me just be the one to catch them. Let's leave it to the court and jury to do the rest.

The article continued, giving the arrest record of each of the four suspects. The article also described how the suspects were arrested after they robbed a grocery store in Slate Creek, Virginia, and attempted to run a police roadblock. The article also indicated that credit cards belong-

ing to Chester Alday and a jacket which belonged to missing Pennsylvania youth Richard Miller were found in the automobile in which the four suspects were traveling. The article also noted that after his arrest, petitioner Coleman allegedly admitted that the four had killed Pennsylvania youth Richard Miller. Coleman was quoted as stating that "[w]e killed him, because we didn't want any witnesses." An attorney appointed to represent one of the four suspects was quoted as stating that "[i]t's the worst thing that's ever happened to me." Another stated, "I've done everything I can to get out of it."

The cover of the November issue of *Detective Files* magazine was captioned "Sex Ghouls in Georgia, 'Six For the Grave . . . One For Us.'" The first page of the accompanying article contained official mug shots of the four suspects and in large type stated that "[i]n an effort to satisfy their depraved lust, the foursome didn't shrink from wantonly disposing of anyone who happened to get in their way. As it turned out, six members of a single family were completely obliterated." Devon, *Six for the Grave—One for Us*, Detective Files, Nov. 1973, at 12. The article, describing the four suspects, stated that it "seems likely they came from Hell." *Id.* at 14. According to the article, "they were of that breed which cares nothing for anything except its own brutal needs." *Id.* The article further stated that the four suspects got out of their car at the Alday trailer, "grinning that hard-faced intentness that is known by instinct to all females." *Id.* The article continued and was generally a dramatized account of how the murders might have taken place. Our disposition of the case does not, however, rely upon this particular magazine article at all since, as far as the record indicates, only

a few of the magazines were sold because some local merchants removed the magazine from their shelves, deeming it "gross" and "misleading."[13]

Another article captioned "Seminole Sheriff Isn't Letting Feelings Come Before His Job" was distributed to an uncertain number of individuals in Seminole County who contributed to the Georgia Sheriff's Boys' Ranch, an orphanage. The article consisted primarily of a series of quotes from Seminole County Sheriff Dan White. In the article, he stated:

> If I had my way about it, I'd have me a large oven and I'd pre-cook them for several days, just keep them alive and let them punish. And I don't think that would satisfy me.
>
> . . .
>
> Whenever I'm protecting them, I'm going to do my job and bring them to court, and I hope they'll get justice.
>
> I don't see where they could put up any plea for mercy. The acts of these men are lower than animals.
>
> . . .
>
> If a citizen gets out of hand and starts shooting people up, there's only one way to arrest and that's with a shotgun.
>
> Any man that believes in God believes in capital punishment. I could throw the switch to the electric chair and never lose a minute's sleep.

Virtually the only account of publicity generated through the broadcast media[14] that is in the record consists of a transcript of news broadcasts on the Georgia Network News from May 15, 1973 through January 15, 1974.

Apparently, WAZA in Bainbridge was the only radio station in the Seminole County listening area which carried the Georgia Network News. The record indicates that WAZA broadcast into parts of Seminole County and could be received in Donalsonville and Iron City, the major towns in Seminole County. Surveys or ratings showing the exact listening audience in Seminole County were unavailable because WAZA is located in a small community and does not regularly commission such studies. Deposition of William Roy Simpson at 3-4.

The initial broadcasts on May 15, 1973 identified the victims and contained little information concerning the suspects other than to note that they were "hippy type[s]." On the afternoon of May 15, however, the Georgia Network News reported that authorities were looking for "three whites and a black male that were escapees from a Pennsylvania prison, and they had left a car with Pennsylvania tag down there." A subsequent May 15 broadcast stated that authorities "know who they're looking for in connection with the murders." The report stated that:

> [T]he escapees came to the Alday home where Mrs. Alday was. They abducted her, then methodically shot the Alday men as they returned to the home from farm work in nearby fields. They then took Mrs. Alday about five miles from the mobile home to a wooded area, where they were believed to have raped and shot her in the head and back. They abandoned the stolen car at the scene and fled in Mrs. Alday's car.

In a May 16 broadcast, the director of the Georgia Division of Investigation, William Beardsley, stated that he felt that "we have some very valid prints." In a subsequent May 16 broadcast, Beardsley indicated that finger-

prints were found "in the trailer and some on the automobile that was abandoned, where the woman's body was found." Each of the May 16 broadcasts also theorized that the rape of Mrs. Mary Alday was the only motive in the case. The May 16 broadcast noted that authorities were still lacking "the main lead, where the three Maryland prison escapees went after they reportedly shot and killed the six Aldays." The May 16 broadcast also theorized that the four suspects might be connected with some murders in Florida.

The first broadcast on the Georgia News Network of May 17 stated that "fingerprints which state agents found virtually all over the place at the crime scene outside Donalsonville and in an abandoned car have helped police firmly identify the suspects as three Maryland prison escapees and the brother of one of them." Subsequent broadcasts on May 17 described how Ms. Mary Alday's car was found in Livingston, Alabama. Virtually all of the May 17 broadcasts identified the suspects as Maryland prison escapees.

The initial broadcast on May 18 described how George Dungee had been taken into custody in West Virginia and that authorities were continuing their search for the other three suspects. The report noted that the "four are believed to be the killers of six members of a Donalsonville, Georgia, family last Monday night." A subsequent May 18 broadcast described how police in West Virginia captured the three remaining suspects with bloodhounds. In another May 18 broadcast, Sheriff Dan White reportedly stated that "he thinks the people in his county are so incensed at the shootings that there may be a try at mob

violence if the four suspects are brought to the area." Another May 18 broadcast reported that "the McDowell County, West Virginia, Sheriff said today that a fugitive taken into custody yesterday, 35 year old George Dungee, confessed to complicity in the South Georgia incident, but charged that 26 year old Wayne Coleman, another of the fugitives, shot the six Aldays." Sheriff White was again reported as having said that "there is a possibility that if the suspects were brought to Donalsonville for jailing prior to trial, that the enraged population, at least some members of it, would attempt mob violence, meaning a lynching." In a broadcast during the afternoon of May 18, West Virginia Sheriff Archie Day was quoted as stating that "[t]hey [the suspects] have—the colored boy did confess to me that they were the ones that killed these people down there." That report also noted that Seminole County officials feared mob violence if the suspects were brought back there to be jailed. In a subsequent broadcast on the afternoon of May 18, Sheriff White was quoted as stating:

> It's a relief to us that we've got these men and we'll bring them to justice. We have a—we have a fair courts [sic] here, good a' courts as there is in the nation, and our people here believe in God and they believe in law and order. You got to believe in God if you believe in law and order. You got to believe in cap—if you believe in God, you got to believe in capital punishment.

Another broadcast during the afternoon of May 18 repeated the quotation in which Sheriff Archie Day described how George Dungee confessed. The report also repeated Sheriff White's "God, law, and order" quotation noted above, which was broadcast earlier in the day.

The initial broadcast on May 21 described how the four suspects were being taken to Donalsonville for a prelimiary hearing. The broadcasts stated that "[p]olice and state troopers in the southwest Georgia town of Donalsonville will be out in force today to protect the four from potential mob action, which the sheriff, Dan White, says is a real potential." In the same broadcast, Everett Alday appealed to residents to keep their heads because "enough folks have been hurt already." In a subsequent broadcast on the morning of May 21, the Georgia Network reported that "purchases of handguns in the small Southwest town of Donalsonville has [sic] skyrocketed." Another May 21 broadcast described how William Isaacs "reportedly laughed and smirked during the court hearing in Donalsonville." The report also indicated that immediately following the preliminary hearing, one of the prisoners would be taken to Pennsylvania to assist in the search for the body of Pennsylvania youth Richard Miller. When Georgia Division of Investigation Director William Beardsley was asked about the possibility of mob action, he stated, "Oh, no, no, uh-uh. These are very sophisticated people down here. We didn't anticipate anything, and I'm just sure there won't be anything." A broadcast on the evening of May 21 described the suspects' preliminary hearing and again noted that William Isaacs "reportedly laughed and smirked during the court hearing." In the broadcast, a police officer was quoted as describing the young Isaacs as "the meanest bastard of them all." This report also indicated that "one of the four accused killers will be going back to Pennsylvania, where he reportedly stole a car and killed the driver of that car, Wayne Miller."

On the morning of May 22, the Georgia Network reported that "[a]s the sun comes up on McConnellsburg, Pennsylvania, today, police will remove a 26-year-old Alday murder suspect, Wayne Coleman, from a jail cell to look for a dead man. Coleman reportedly told Georgia authorities he killed the driver of a car he and three others stole before coming to Georgia last week." In numerous other broadcasts on May 22, Georgia Division of Investigation Director William Beardsley indicated that evidence against the four suspects was not yet complete but nonetheless expressed his confidence that the evidence would be sufficient when the four came to trial. Another May 22 broadcast noted that former Lieutenant Governor Peter Zack Geer had been retained as a special prosecutor in the case by the Alday family.

In a May 23 broadcast, the Georgia Network reported that Pennsylvania police were still looking for the body of a Pennsylvania youth. The report stated that "[p]olice say they believe the original four murder suspects from Maryland stole the car after Coleman killed the driver, and used the car as their transportation to Georgia before the Alday murders of Donalsonville." A subsequent broadcast on May 23 noted that Pennsylvania authorities were "looking for the body of a man Coleman allegedly told police he killed." Subsequent broadcasts on May 23 also focused on petitioner Coleman's assistance in the search for the body of the Pennsylvania youth.

On May 25, the Georgia Network News focused on several attorneys' reluctance to act as defense attorneys for the suspects. In one May 25 broadcast, state Senator Julian Webb of Donalsonville was quoted as stating:

> The Alday families, both Ned and Aubrey, were friends of mine for many years. Ned Alday's farm is just north of my farm, and Aubrey Alday's farm is just south of mine. And secondly, I sponsored the death penalty law which is now on the statute books, and apparently these crimes fall squarely within the provisions of that statute.

According to the report, Senator Webb deemed the appointment a "conflict of interest," and he stated that the four suspects could get fair trials in Seminole County.

The next broadcast in the case apparently came on June 4 when the Georgia Network News reported that Maryland police had found the body of Richard Miller. According to the report, "[o]ne of the alleged Alday murderers, Wayne Coleman, reportedly told police that he and his three companions shot and killed Miller after stealing his car. Authorities speculate that the four killed Miller because they did not want any witnesses."

Until December, when the actual trial began, reports on the Georgia Network were primarily factual and contained no prejudicial information although reports on June 20 and on September 4 identified three of the four suspects as prison escapees from Maryland. Otherwise, the broadcasts simply recounted procedural events in the case.

On December 24, however, the Georgia Network reported that Billy Isaacs "is expected to be a star witness for the prosecution against his brothers and a third companion when their murder trials begin in Donalsonville December 31st." The report continued noting that "Isaacs may well be the only eyewitness to the crime available to the prosecution. He has reportedly issued a statement to

lawmen describing the slayings of Ned Alday, his three sons, Jimmy, Jerry and Chester, his brother Aubrey, and daughter-in-law, Mary Campbell Alday." Subsequent reports on December 24 repeated this information.

Broadcasts on December 28 also noted that Billy Isaacs "is believed to have turned State's evidence, and may provide eyewitness testimony to the slayings."

Broadcasts on December 31 on the Georgia Network noted that jury selection in Carl Isaacs' case was proceeding, and many of the broadcasts noted that one of the suspects who had already pleaded guilty was expected to turn state's evidence in the case against Carl Isaacs.

January 1 broadcasts on the Georgia Network indicated that special prosecutor Peter Zack Geer promised to produce an eyewitness to the killings and also noted that a local resident had identified Carl Isaacs as the driver of an automobile seen leaving the Alday trailer on the day of the murders in his testimony.

A January 2 broadcast on the Georgia Network described Billy Isaacs' testimony as follows:

> A teenager has testified at Donalsonville that his brother and two other men wiped out a farming family of six in an isolated trailer last May, killing five men and one woman, one by one. But 16 year old Billy Isaacs, the State's star witness, denied that he killed or assaulted anyone. He testified against his own brother, 19 year old Carl Isaacs, the first of the three defendants to be tried for the murders of six members of the Ned Alday family. Young Isaacs said that his brother gave the orders for the killings as the Alday men showed up during their burglary of the trailer.

On the evening of January 2, another Georgia Network News broadcast further described Billy Isaacs' testimony as follows:

> With his brother sitting directly in front of him, Billy spelled out in a flat, unemotional voice the details of that day of horror last May. Billy said that over the course of an hour, Carl Isaacs took three of the Alday men and one at a time shot them in the head. Billy also said two other Alday men and Mary Alday were similarly murdered by the two other suspects in the case. Those other suspects will be tried separately.

A broadcast on the morning of Janaury 3 repeated this information and noted that closing arguments in the case were expected that morning. Another broadcast on the morning of January 3, describing Billy Isaacs' testimony, stated that "Billy told how over an hour, Carl methodically shot three Alday mn in the head, laughing when one begged for mercy." Subsequent broadcasts on January 3 described how the jury brought back a guilty verdict against Carl Isaacs.

On the morning of January 4, the Georgia Network reported that Carl Isaacs had been sentenced to death the previous day after being found guilty on six counts of murder. The report stated that "Isaacs is said to have yawned while the prosecutor was asking for the death penalty." Subsequent reports on January 4 noted the guilty verdict and death sentence announced in Carl Isaacs' case and indicated that George Dungee was set to go on trial the following Monday.

On January 7, numerous reports on the Georgia Network News indicated that jury selection was proceeding in George Dungee's case and also reminded listeners that

Carl Isaacs had been found guilty and sentenced to death the previous week.

In a morning broadcast on January 8, the Georgia Network News reported that defense attorneys for George Dungee planned to object to a "legal confession" that special prosecutor Peter Zack Geer said he hoped to introduce at the trial. Subsequent broadcasts on the morning of January 8 repeated the information with respect to the alleged confession of Dungee, and another January 8 broadcast stated that "[y]oung Billy Issacs is expected to take the stand later today to describe Dungee's part in the killing of six members of the Alday family last May." In the afternoon of January 8, the Georgia Network News reported that a Georgia law enforcement official testified that George Dungee's fingerprints were found on a beer can outside of the mobile home where the crime occurred. The official was also reported as having testified that four prints were found inside the mobile home and that fingerprints were also found on the 1970 Chevrolet which was found in Livingston, Alabama, that belonged to Mary Alday. Subsequent reports on the afternoon of January 8 reiterated the fact that "fingerprints at the scene of the Alday murders in Donalsonville put George Dungee at the scene."

Broadcasts on the morning of January 9 described how Billy Isaacs testified that George Dungee "pulled the trigger on the gun which took the life of Mrs. Mary Alday." The reports also indcated that Carl Isaacs had previously been found guilty and sentenced to death by a Seminole County jury. On the afternoon of January 9, the Georgia Network News reported that George Dungee was the second defendant in the case to be convicted and

receive the death penalty. Similarly, reports on January 10 indicated that Dungee was the second of the defendants to receive the death penalty and that the trial of the third and final defendant, Wayne Coleman, was scheduled to begin the following Monday.

Testimony developed in the evidentiary hearings on remand in the district court clearly establishes that word-of-mouth communication constituted one of the major means in which Seminole County residents received their news. Mr. Alto Lee, an attorney who assisted in the prosecution of the case at trial, testified that as regards the Alday murders, "because of the number of people involved in this and the attention that it received from elsewhere, I don't know exactly how I could categorize it, sir. Things were known in Seminole County. It's a small, rural county. It's not a large county. And when something happended, it was pretty well known down there, be it the Alday case or be it other cases, other matters like that. Yes, sir, the word got around." Supp. Record on Appeal, vol. 3 at 62.

Undoubtedly, the most colorful description of word-of-mouth communication in Seminole County came from Ms. Thelma V. Harrington, a lifetime resident of Seminole County and a juror in the Dungee case. According to Ms. Harrington, news of the murders "scattered just like fire in broom sage." *Id.* at 176. As regards the electronic media, Ms. Harrington testified that after the murders occurred, "everybody listened more than usual." *Id.* at 177. When asked whether local residents talked about the crimes a great deal, Ms. Harrington stated, "My Lord. They'd have had to have lockjaw not to because that was the topic or the subject around a little town like Donalson-

ville there, and everybody was so excited and upset over it." *Id.* at 186. Ms. Harrington described the way word was transmitted through the community as "just like chaff in the wind." *Id.* at 195. She stated, "[r]adio, television, mouth-to-mouth and friend-to-friend. Everybody was talking about it." *Id.*

One of the most disturbing portions of Ms. Harrington's testimony, however, is her description of the community attitude existing at the time of trial. The colloquy reveals the following:

> Q. Okay. And everybody was upset about it?
>
> A. Why, sure.
>
> Q. What do you mean by that?
>
> A. Well, they were nice people, religious people, and good citizens, and they hated to see people like that did kill them do it.
>
> THE COURT: In other words, the people in the county were not in favor of it?
>
> THE WITNESS: That's what I'm trying to say. That's exactly. Appreciate your straightening it out for me.
>
> BY MR. BRIGHT: Q. Right.
>
> A. No, nobody condoned it at all.
>
> Q. And did people indicate what they thought ought to be done about it?
>
> A. Mighty right they did.
>
> Q. What did they say?
>
> A. Fry 'em, electrocute 'em.
>
> Q. What else?
>
> A. That's about all I heard, and that's what should be done for 'em.

Q. But that was the community sentiment, fry 'em or electrocute 'em?

A. Everybody felt that, yes.

Q. Everybody?

A. Yes.

Id. at 187-88.

Ms. Harrington's testimony on cross-examination by the state's attorney also reveals the following:

Q. Ms. Harrington, isn't it true that members of the Seminole County and Donalsonville area that you talked to said the defendants should be electrocuted or fried, as you've said, if they were the ones that had committed the crimes?

A. Everybody had that sentiment, I think.

Q. Isn't that with the ones that had committed it though, Ms. Harrington?

A. Yes.

Q. They should not be punished if they had not done the crime though, should they?

A. Well, everybody knew they did it though.

Q. How did they know that, Ms. Harrington?

A. All the circumstantial evidence.

Id. at 197.

Another local resident, Mr. Watson Lee, testified that the Alday murders were the biggest news story he could remember during the fifty years he had lived in Donalsonville. *Id.* at 201. Mr. Lee also described the victims' family as "one of the most prominent families in Seminole County." *Id.* at 202. When asked whether he was aware of anyone who had not heard about the cases by the time

they came to trial, Mr. Lee stated, "No, sir, not that I know of because it's a small place and news gets around, you know. And people like to keep up on things like that down there." *Id.* at 203. Although indicating he would be afraid to say what people in the community thought ought to happen to the guilty parties, when pressed, Mr. Lee stated: "Well, I mean most of them that I heard thought it was a terrible thing and that they ought to get a severe penalty out of it." And when asked what he meant by "severe penalty," he continued: "Well, I don't know. They didn't say executed. You know how a small town is. But that's probably what they had in mind." *Id.* at 204.

Mr. Bobby Nichols, the clerk of the trial court in which the defendants were convicted, stated that he knew of no other trial in Seminole County during the period of time in which he had been acting as clerk of the court which received any more publicity than this trial. *Id.* at 224. Mr. Nichols also testified that the only news event that received as much publicity at the outset was a hotel fire that had occurred several years earlier. *Id.* at 225. Mr. Nichols also testified that before Coleman's trial began, he formed an opinion that the suspect was guilty. *Id.* at 230. Mr. Nichols also testified that after Carl Isaacs' trial was complete, he decided that if the other defendants were subsequently convicted, they should also receive the death penalty. *Id.* at 231.[15]

Mr. Bill Montgomery, a reporter with *The Atlanta Journal* who was in Seminole County shortly after the crimes were committed and interviewed local residents to get a sense of the reaction of the community, testified that "from personal interviews that I had with people and

hearing conversation on the streets, from interviews, they wanted the defendants caught and they wanted them executed." *Id.*, vol. 2 at 46-47. Mr. Montgomery testified that he never heard any different attitude expressed by anyone in the community and stated that the "general attitude to my recollection all along was that if they were guilty they should be executed." *Id.* at 48. When asked whether he met anyone who had a contrary opinion, Mr. Montgomery stated "I can't recall anybody—the people that I talked to were—the people that I talked to seemed to feel that these were the right people, that these defendants had committed the murders and that they wanted them executed, the people that I talked to." *Id.* at 69.[16]

Dave Harrison was a reporter with *The Albany Herald* and covered a five-county area, including Seminole County from 1972 to 1977. Mr. Harrison described Seminole County as a "very tight knit community," *id.*, vol. 5 at 470, in which "everybody knows everybody. Everybody is almost kin to everybody else in the county. It's that type community. Everybody considers everybody else neighbors." *Id.* at 471. Although the *The Albany Herald* was a daily paper, Mr. Harrison felt that word-of-mouth communication in the community was such that the majority of the people in the county knew about the crime before *The Albany Herald* got to the county. *Id.* at 477. Mr. Harrison also stated that the "talk" that he heard with respect to the perpetrators of the Alday murders was that the "people who killed the Alday family should be given the same type justice that the Alday family was given." *Id.* at 479. In Mr. Harrison's opinion, the Alday mur-

ders were "the biggest news story that's ever happened in that county." *Id.* at 482. Mr. Harrison indicated that neither the publicity that he saw nor the conversations that he heard contained any information that was favorable to the suspects in any way. *Id.* at 483. In describing the hostility the community felt towards the suspects, Mr. Harrison stated that "people were just very angry about it, and they wanted the people who had done this to pay for it. They wanted revenge." *Id.* at 484. Mr. Harrison also testified that there was a "general community opinion" that whoever was guilty of the Alday murders should receive the death sentence. *Id.* at 486. Mr. Harrison did testify, however, that he heard some humors in the community that individuals who were associated with a man previously found guilty of a robbery in the area might have been responsible for the Alday murders. Mr. Harrison also testified that he heard rumors to the effect that individuals in a religious organization which was located in Seminole County and which consisted primarily of blacks from New York and New Jersey might have been involved in the Alday murders. *Id.* at 498-99. Mr. Harrison also agreed that some members of the community spoke out in the press and said they wanted to make sure the defendants got a fair trial "because they didn't want them to get off." *Id.* at 499.

Mr. Bill Cotterell, a reporter for United Press International was also in Seminole County shortly after the crimes were committed and again during the trials. In describing the types of media available to the residents of Seminole County, Mr. Cotterell stated, "I'd say radio, television, the daily newspapers. The time I spent there I would also feel that just word-of-mouth in such a small

place. Word got around fairly fast and not always accurately, but major events were common knowledge very quickly throughout the community." *Id.* at 510. In preparing his news stories, Mr. Cotterell stated that he spoke with numerous residents of Seminole County. *Id.* According to Mr. Cotterell, the general opinion in the community seemed to be that the four suspects were guilty, and he never heard anyone express a contrary opinion. *Id.* at 514. Although Mr. Cotterell did not remember asking the citizenry's opinion as to the appropriate punishment, he testified that "usually as a continuum in a sentence people would say people like that ought to be executed." *Id.* Although Mr. Cotterell testified that he never heard anybody directly threaten the lives of the four suspects, he stated that he "heard frequent expressions of an attitude that 'isn't it too bad that when they get these guys and when they're convicted it's going to take forever for justice to be done, and wouldn't it be better if we could just do it on the spot.'" *Id.* at 515.

On the Saturday following the murders, Mr. Cotterell stated that he was in Donalsonville for a scheduled arraignment which never took place. Mr. Cotterell described how a crowd had gathered in downtown Donalsonville and stated that "there was a persistent opinion expressed that if the judge just released them on recognizance and bound it over for trial, that justice would then be swiftly done within the community." *Id.* at 516. Mr. Cotterell further testified that when he returned to Donalsonville for the trial of Carl Isaacs there was no change in attitude and that he "heard no one express any doubt that they were guilty and that they deserved to be executed." *Id.* at 522. On cross-examination, Mr. Cotterell agreed that the com-

munity wanted the defendants to receive a fair trial. *Id.* at 530.

Gil Kelley, owner of the local radio station in Donalsonville, gave what is probably the most favorable testimony to the state. As the events surrounding the Alday murders were unfolding, Mr. Kelley testified that "the biggest job that my station had, I had, was keeping the true identity of the people of Seminole County. Seminole County is not a South Georgia, back-woods, red-necked community. It's a cultured community. It's a refined community." Deposition of Gilbert M. Kelly at 14. Mr. Kelley stated that the Aldays murders were not the biggest news story that his radio station had ever broadcast nor was it one of the most important news stories. *Id.* at 16. Nonetheless, Mr. Kelley admitted that the common feeling among residents in the county was that most probably, the authorities had arrested the proper parties in the case, and he also stated that he was not personally aware of any sentiment in the community which desired an acquittal in the case. *Id.* at 21. On cross-examination, however, he responded affirmatively to a question as to whether the defendants could get a fair trial at that time in Seminole County, *id.* at 50, and stated that the trial was not a foregone conclusion. *Id.* at 51.

Waldo McLeod, editor of the *Donalsonville News*, agreed—"[i]n all honesty, I think affirmative"—that the general feeling in the community was "that the persons who had been charged with this crime were the ones who had committed it," and "that the law enforcement officials had arrested the right people." Deposition of Waldo L. McLeod at 27. Moreover, Mr. McLeod agreed that the Alday murders were really the biggest news story that came

out of Seminole County. *Id.* at 31. Later, Mr. McLeod stated that he believed they had a fair trial. *Id.* at 33.

III. APPLICATON OF THE PRESUMED PREJUDICE STANDARD

At the outset, we emphasize the fact that the presumptive prejudice standard recognized in *Rideau* is only "rarely" applicable, *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 554 (1976), and is reserved for an "extreme situation." *Mayola v. State of Alabama,* 623 F.2d 992 (5th Cir. 1980). In short, the burden placed upon the petitioner to show that pretrial publicity deprived him of his right to a fair trial before an impartial jury is an extremely heavy one.

In *Patton v. Yount,* 467 U.S. —, —, 81 L.Ed.2d 847, 857 (1984), the Supreme Court held that where the partiality of an individual juror is challenged. the statutory presumption of correctness due a state court's factual findings under 28 U.S.C. § 2254(d) is fully applicable. With respect to the actual prejudice issue—*i.e.,* whether prejudice has invaded the actual panel of twelve jurors—the *Patton v. Yount* majority questioned the conclusion that it was a mixed question of fact and law. However, without definitively resolving the issue, the Court applied the *Irvin* "manifest error" standard, intimating that there may be "little practical difference between the Irvin 'manifest error' standard and the 'fairly supported by the record' standard of the amended habeas statute." *Id.* at — n.7, 81 L.Ed.2d at 854 n.7. With respect to the somewhat different presumed prejudice inquiry under *Rideau,* we need not decide whether presumed prejudice is a mixed question of fact and law[17] or a pure question of fact, be-

cause applying any of the relevant legal standards, be it "manifest error," "fairly supported by the record,"[18] "clearly erroneous," or independent review of a mixed question of fact and law under the extremely high *Rideau* standard, we conclude that Coleman has met the standard.[19]

Applying the extremely high standard of review, our review of the record in the instant case leads to the inescapable conclusion that petitioner Coleman was denied his right to a fair trial before an impartial jury. Indeed, this case is a close case only because of the extremely high standard that must be met. If there were no constitutional right to a change in venue in the instant case, then one can conceive of virtually no case in which a change of venue would be a constitutional necessity.

In determining whether petitioner Coleman's jury met the constitutional standard of "a panel of impartial 'indifferent' jurors," *Irvin v. Dowd,* 366 U.S. at 722, we must examine the totality of the circumstances surrounding the petitioner's trial. *See Murphy v. Florida,* 421 U.S. 794, 799 (1975). In examining the totality of the circumstances surrounding petitioner Coleman's trial, we emphasize the fact that no single factor is dispositive. Instead, we have weighed each element of the prejudicial publicity, taking into consideration the pervasiveness of the circulation thereof, and how that publicity contributed to the totality of the circumstances. Although residents of Seminole County may have been exposed to more than one of the several media, i.e., newspaper, broadcast and word-of-mouth, our evaluation has recognized the obvious fact that no one person would have read, for example, all of the newspapers summarized in this opinion, or all of the pub-

licity in any single newspaper. Thus, we have been careful to discount accordingly the overwhelming cumulative weight of the description in Part II of this opinion.

After reviewing the record in the instant case, the manifest picture that emerges is a community that was deeply prejudiced as to both guilt and sentence. As soon as petitioner Coleman and his co-indictees were identified as suspects in the case, law enforcement officials announced that circumstantial evidence against the suspects was "overpowering," and that "there's no point in looking for anybody else." The press revealed that the suspects' fingerprints had been found at the scene of the crime. The fact that petitioner Coleman and his co-indictees were escapees from a Maryland prison was reported along with their prior criminal records, including the crime spree along the Eastern Seaboard of which the instant murders were a part. Petitioner Coleman was rarely identified as a suspect in the case without the article noting that he had confessed to the murder of Pennsylvania youth Richard Miller. All of the foregoing was widely reported in all of the newspapers serving Seminole County, and in what the record discloses of the broadcast media. It was repeated time and again. The details of the testimony of Coleman's own half-brother, Billy Isaacs', describing explicitly the horrible manner in which Coleman and the others murdered the six Alday family members, were widely and repeatedly reported in Seminole County immediately prior to Coleman's trial. In short, there was an overwhelming showing in the press of petitioner Coleman's guilt before his trial ever began.

In addition, there was publicity that was either calculated to provoke hostility or reflective of an atmosphere

of hostility; including, *inter alia,* the "precook" and other egregious remarks by the county's chief law enforcement officer, Sheriff White; the newspaper description of the defendants as smirking and other characterizations of remorselessness and other derogatory characterizations; the remarks of the defendants' own mother suggesting that mercy was inappropriate; the efforts and statements of numerous attorneys to avoid appointment, both reflecting their assessment of the community atmosphere and aggravating same; and the direct testimony of several residents and newsmen, whose job included assessment of the community atmosphere, to the effect that the community had prejudged the case.

Further aggravating the atmosphere was the evidence that the community was of the opinion that death was the only appropriate penalty for those found guilty of the Alday murders. The fact that the family wanted the death penalty pervaded the community. This was particularly prejudicial because Seminole County is a small community in which the victims' family was well known and respected, and the voir dire revealed that several jurors knew the family. One knew five of the six victims personally and attended their funeral. Another had known the victims for eight years and had worked with two of them. A third went to the trailer to pay his respects to the family two days after the victims' deaths. It was common knowledge in the community that special prosecutor Geer was retained by the surviving family members to prosecute the case. This fact coupled with his appeal to jury to impose death conveyed the unmistakable implication to the jury that the family hoped that the defendants would receive the death penalty. Moreover, shortly before petitioner

Coleman's trial it was widely reported that family members were pleased with the death sentence returned in Carl Isaacs' case. Significantly, the community's ranking law enforcement officer made widely reported and outrageous statements as to the need for vengeance, retribution, and capital punishment, all in the name of "justice."[20] Finally, editorials called for the death penalty, and reports of comments from attorneys and other news articles repeatedly suggested the appropriateness of the death penalty.

The clear picture that emerges from the publicity itself—that the community was predisposed as to both guilt and sentence—is borne out by the testimony of several local residents and by the testmony of several journalists whose jobs included reporting the atmosphere of the community at the time. *See supra* 107-115. As Ms. Harrington testified: everyone knew they were guilty and everyone knew they should be electrocuted.

Under such circumstances, it is inconceivable to think that petitioner Coleman received an impartial assessment of his guilt or innocence on the basis of the evidence, and the detached weighing of aggravating and mitigating circumstances which the Georgia death penalty system contemplates.[21]

The description of the publicity set out earlier in this opinion leaves no doubt but that this small community was overwhelmed and saturated with prejudicial and inflammatory publicity.

The showing made by petitioner Coleman in the instant case equals that made in *Rideau*. As summarized above, the press saturated the community with overwhelming evidence of Coleman's guilt. The explicit details of

the inculpatory and eyewitness testimony of Coleman's own half-brother, Billy, together with the other publicity in this case, approaches the prejudicial impact of the televised confession in *Rideau*. In some respects, the instant conviction is even more vulnerable than *Rideau*. Many of the widely publicized facts were not admissible at Coleman's trial,[22] *e.g.*, his confession to the murder of the Pennsylvania youth, the fact that he was an escaped convict and his participation in a crime spree along the Eastern Seaboard. Also there was strong additional evidence here, but not in *Rideau*, that the community was inflamed, *e.g.*, the sheriff's egregious remarks, the direct testimony of residents and newsmen, and the other evidence summarized above. In addition, Seminole County's population of 7,000 was much smaller than the Calcasieu Parish population of 150,000, the significance of which is magnified by the evidence of the community's and the jury's friendship and sympathy for the victims and their family. Finally, the instant case is stronger than *Rideau* in that there was no evidence of prejudice as to sentence in *Rideau*, whereas there was very strong evidence in this case, as summarized above.[23]

We conclude that petitioner has adduced evidence of inflammatory and prejudicial pretrial publicity that so pervaded the community as to render virtually impossible a fair trial before an impartial jury. Just as it is inconceivable that Rideau could have received an impartial assessment of his guilt in the community in which his televised confession was broadcast, it is inconceivable that petitioner Coleman could have received either an impartial assessment of his guilt or innocence or a detached weighing of aggravating and mitigating circumstances in Seminole

County. The district court's finding to the contrary is clearly erroneous, and any finding to the contrary would be manifest error.

The state argues that there was no "nexus" between the pretrial publicity and the guilty verdict and death sentence returned by the jury. In *Rideau*, however, the Supreme Court specifically rejected the view that a habeas petitioner must establish a "substantial nexus" between the pretrial publicity and the petitioner's trial. *See id.* at 729 (Clark, J., dissenting). The reason for such a rule is clear: when the extremely high showing required by *Rideau* is made, prejudice is manifest and thus is presumed.

The state also repeatedly argues that there was overwhelming evidence[24] of the petitioner's guilt and also argues that the facts proved at trial were such that death was the only appropriate sentence. We believe that there was, in fact, overwhelming evidence of the petitioner's guilt adduced at trial. Nonetheless, we conclude that that fact cannot be dispositive in assessing petitioner's change of venue claim. In *Rideau*, the evidence of guilt was also overwhelming; the Supreme Court nevertheless presumed prejudice. To hold otherwise would mean an obviously guilty defendant would have no right to a fair trial before an impartial jury, a holding which would be contrary to the well established and fundamental constitutional right of every defendant to a fair trial. In *Irvin v. Dowd*, the Supreme Court noted that a "fair trial in a fair tribunal is a basic requirement of due process" and stated that "[t]his is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station

in life which he occupies." 366 U.S. at 722. Even if the Supreme Court precedent allowed us to consider harmless error as to guilt, the absolute discretion of a Georgia jury to grant mercy for any reason, *Zant v. Stephens,* 250 Ga. 97, 297 S.E.2d 1 (1982), would make it anomalous to apply the overwhelming evidence concept to the sentencing phase.

The state also argues that there was a substantial "cooling off" period between the commission of the crimes and petitioner Coleman's trial. Although there was some slackening of the publicity from July until November, several factors persuade us that there was not a sufficient change in the nature or amount of the publicity to conclude that "the feelings of revulsion that create prejudice have passed." *Patton v. Yount,* 467 U.S. —, —, 81 L.Ed. 2d 847, 856 (1984). First, much of the procedural publicity during this time also reminded readers of the facts of the crimes, the suspects' escape from a Maryland prison, or the murder of Pennsylvania youth Richard Miller, and petitioner Coleman's confession to that murder. The first crime magazine, *Front Page Detective,* came out in August, during the supposedly cool period, and sold an unusually large number. Finally, there was intense publicity in the several weeks prior to petitioner Coleman's trial, recapitulating the details of the prejudicial publicity which had previously been reported, and adding the publicity of the recent trials and death sentences of Carl Isaacs and Dungee and the explicit details of Billy Isaacs' testimony.

The state argues that the voir dire record in this case rebuts any finding of presumed prejudice. Assuming that there can be such a rebuttal,[25] we conclude that the voir dire record in this case does not rebut the presumption of prejudice. We begin by detailing the manner in which the

voir dire examinations were conducted. The trial judge called prospective jurors into the jury box in panels of twelve. The record indicates that all other members of the venire were in the courtroom while the panel of twelve was the subject of questioning. Questioning began with the prosecutor, who put a number of questions to the panel of twelve en bloc. Typically, special prosecutor Geer asked the prospective jurors if they had any prejudice or bias in their minds either for or against the defendant. Then the special prosecutor asked them if their minds were perfectly impartial between the state and the accused. After special prosecutor Geer finished with the en bloc questions, the trial court permitted the prosecutor and defense counsel to ask questions of the prospective jurors individually. The trial judge did not limit defense attorneys either in terms of the time to ask questions or in terms of the nature of the questions that they could ask. However, the voir dire is subject to question for several reasons. First, prospective jurors were examined in the presence of prospective jurors who had not yet been examined. In light of the significant possibility of prejudice, preferable voir dire procedures would have followed the ABA Guidelines:

> If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors.

ABA Standard for Criminal Justice, § 8-3.5(a) (2d ed. 1980) (quoted in C. Wright, 2 *Federal Practice & Procedure* § 381 at 337 n.10 (2d ed. 1982)). In *Irvin v. Dowd*, 366 U.S. 717, 728 (1961), the trial court apparently used

similar procedures in selecting jurors. In *Irvin*, the Supreme Court criticized the practice and stated:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father.

Id. In *Patton v. Yount*, 467 U.S. —, 81 L.Ed.2d 847 (1984), the Supreme Court was faced with an actual prejudice claim similar to that presented in *Irvin*. In *Patton*, the Court specifically noted the "significant difference" in the voir dire procedures where veniremen were brought into the courtroom alone for questioning. Although not deemed controlling, that fact was nonetheless "not an insubstantial distinction." *Patton v. Yount*, 467 U.S. at — n.10, 81 L.Ed.2d at 857 n.10.

Another problem with the voir dire in petitioner Coleman's case is that the prospective jurors were not asked questions which were calculated to elicit the disclosure of the existence of actual prejudice, the degree to which the jurors had been exposed to prejudicial publicity, and how such exposure had affected the jurors' attitude towards the trial. *See Calley v. Callaway*, 519 F.2d 184, 208-09 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *cf. Patton v. Yount*, 467 U.S. at — n.10. Instead, leading questions and conclusory answers were typical of the manner in which Coleman's voir dire was conducted. For example, special prosecutor Geer began the individual questioning of prospective jurors and typically asked whether the juror understood "that this defendant, Wayne Carl Coleman, is presumed innocent until proven guilty to a moral certainty and beyond all reasonable doubt by the state of Georgia." Trial Record, Vol. 1 at 85. Geer also typically asked the

juror whether he understood that the defendant "is innocent at this moment under the law." *Id.* Geer often asked, "Would the fact that you might have read something about this case from any source influence your mind one way or the other?" *Id.* Other typical questions included, "Would you go by the evidence in the case and the charge of court given you by the court?" "Do you understand that the defendant doesn't have to prove anything?" and "The burden is on the state to prove him guilty beyond a reasonable doubt?" *Id.* at 86.

Similarly, although the questions posed by defense attorneys were somewhat more effective, they too tended to be conclusory. For example, the defense attorney would typically elicit the fact that the potential juror had read or heard about the crimes, i.e., some exposure. However, that would too often be followed up by a merely conclusory question: "Now, from having read about the homicides and also having read of the persons accused and having also seen this on television, is your mind now perfectly impartial between the state and the accused?"

Despite these problems with the voir dire in petitioner Coleman's case,[26] almost one-half of the jurors who were questioned as to whether they had formed an opinion, were stricken for cause for having a fixed opinion.

For the foregoing reasons, and in light of the overwhelming evidence that the community had prejudged both guilt and sentence, we are satisfied that the conclusory protestations of impartiality in the voir dire are not sufficient to rebut the presumption of prejudice. *Cf. Irvin v. Dowd, supra,* at 728 ("No doubt each juror was sincere when he said that he would be fair and impartial to

petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father'').

IV. CONCLUSION

We thus conclude that petitioner Coleman's evidentiary showing meets the extremely high standard necessary for a successful claim of presumed prejudice. We conclude that the district court's finding to the contrary is clearly erroneous, and that any decision to the contrary would be manifest error and would not be supported by the record. Accordingly, the decision of the district court is reversed and the case is remanded to the district court with instructions to issue the writ of habeas corpus conditioned on the state's right to retry the petitioner within a reasonable time.[27]

REVERSED and REMANDED.

FOOTNOTES

[1] Additional facts are noted in *Coleman v. State*, 237 Ga. 84, 226 S.E.2d 911, 913-14 (1976), *cert. denied*, 431 U.S. 909 (1977).

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209.

[3] The record does not contain a few of the issues of *The Donalsonville News* that were published between the commission of the crimes and the petitioner's trial. We assume that these issues are not a part of the record because they contained no prejudicial information concerning the petitioner's case. We make the same assumption with respect to the missing issues of the other relevant newspapers.

[4] News reports conflict on the subject of which of Governor Carter's relatives attended the funeral. *The Atlanta Constitution* reported that his mother, Mrs. Lillian Carter, attended. *See* p. 75, *infra*.

[5] The page on which the article appeared cannot be ascertained from the record.

[6] The page on which the article appeared cannot be ascertained from the record.

[7] The page on which the article appeared cannot be ascertained from the record.

[8] The page on which the article appeared cannot be ascertained from the record.

[9] The record contains no articles from *The Dothan Eagle* subsequent to the September 28 edition mentioned above. The change of venue hearing was held on September 27.

[10] Articles appearing in *The Atlanta Journal* and *The Atlanta Constitution* are discussed together.

[11] Pages on which many *Atlanta Journal* and *Atlanta Constitution* articles appeared cannot be ascertained from the record. Page citations are made when available.

[12] The state argues that the actual distribution of the September issue of *Front Page Detective* in Seminole County may have been less than this because residents from other counties may have purchased an unspecified number of the magazines from Seminole County merchants. It seems equally plausible, however, that Seminole County residents may have purchased copies of the magazine from merchants outside Seminole County. Moreover, except for the article's inflammatory title and subtitle, the substance is in most respects cumulative of publicity which clearly saturated the community. In any event, to be conservative, we have discounted the reported circulation and our reliance on the article.

[13] In evaluating each element of the publicity and the degree of its contribution to the totality thereof, we have endeavored to take into consideration the degree to which the particular element was widely publicized or not. In this vein, we have accorded no weight to the November issue, given its removal from the shelves.

[14] The tapes of television broadcasts made during the relevant period were unavailable because the respective television stations did not retain copies of the tapes beyond a period of one to two years. In the state habeas hearings, the editor of *The Albany Herald* testified that "the electronic media played . . . [the case] very high." Another reporter with the United Press International testified that as regards UPI wire services, the broadcast wire service stories, designed for radio and tele-

vision, and the newspaper wire stories concerning the Alday case were "factually the same." Supp. Record on Appeal at 504. Similarly, Mr. Gilbert Kelley, owner of the local radio station, testified that he used the UPI wire reports in his station's coverage of the events. Deposition of Gilbert M. Kelley, at 10. Since no media source that we have examined was entirely nonprejudicial, and all carried approximately the same material, it would be reasonable to assume, although we need not do so, that television stations also broadcast prejudicial information concerning the petitioner. We need not make any assumptions concerning the content of television broadcasts because the record discloses the other sources which clearly saturated the community with highly prejudicial publicity.

We also note that the state is not entirely without fault as regards the unavailability of the television transcripts. At the time of petitioner's state habeas hearing, the state habeas court's subpoena power extended only to within 150 miles of the hearing or trial situs. Oral depositions were also precluded because the petitioner was indigent, and the state habeas court refused to provide the funds necessary for a court reporter to transcribe the depositions. Finally, in federal district court, the state opposed the petitioner's attempt to secure an evidentiary hearing, and this court was forced to remand the case to the district court to allow the petitioner an opportunity to make an evidentiary showing with respect to pretrial publicity. *Coleman v. Zant*, 708 F.2d 541, 548 (11th Cir. 1983). Thus, the ensuing delay cannot be deemed to be entirely of the petitioner's own making. In this regard, we note that the state makes no argument based on any alleged delay by petitioner.

[15] Although this is a significant concession from a witness who was even more "unfriendly" to petitioners than other witnesses (most of whom were understandably unfriendly), since Mr. Nichols, as clerk, actually sat through the earlier trials, his tendency to prejudge naturally would have been greater than that of the general public. On the more relevant issue of the opinions of others in the community that he might have heard, Mr. Nichols was more equivocal, although he did "assume that they felt like the punishment was just," and he did say that community sentiment was that the guilty parties should be punished and that the people wanted "justice to be done." *Id.* at 233. Moreover, earlier in his testimony Mr. Nichols had refused to affirm that the news accounts before trial had given the impression that Coleman, et al., were guilty; he would acknowledge only the impression that they were "accused" and that they were "good suspects." *Id.* at 227-28. Mr. Nichols' testimony is sufficiently equivocal that Coleman cannot place much reliance on it.

[16] Mr. Montgomery also testified that he did some investigative work in Seminole County in connection with a story written five years after the crimes occurred. Mr. Montgomery interviewed Mr. Bud Alday in connection with his story. According to Mr. Montgomery, Mr. Alday said "that some individuals—he didn't say who they were, as I recall wouldn't say who they were—but some individuals came to him that week after the defendants had been captured in West Virginia and had told him something to the effect that, you know, you give the word and this quote—I remember the direct quote—said something, if you give the word, we'll take those boys when they're brought back for arraignment. And he said that 'I told them not to, I talked myself'—as I recall, he said something like, 'I talked myself blue in the face' and said that 'society, the courts had to be given a chance.' " Supp. Record on Appeal, vol. 2 at 109-10. We place no reliance on this post-conviction revelation.

[17] The law of this circuit has treated the presumed prejudice issue as a mixed question of fact and law. *United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979), *cert. denied*, 444 U.S. 1019 (1980); *United States v. Williams*, 523 F.2d 1203, 1208 (5th Cir. 1975).

[18] Although beside the point in light of our analysis, it is clear from the previous appeal in this case, *Coleman v. Zant*, 708 F.2d 541 (11th Cir. 1983), that the "fairly supported by the record" standard would be inapplicable. Because material facts were not adequately developed at the state court hearing, and because petitioner was unable to adduce live testimony due to state procedural limitations and lack of funds, there is little doubt that the state court hearing was not full and fair. *Id.*

[19] In view of our disposition of the case, we need not decide whether the state should be deemed to have waived any argument that the issue is one of pure fact, because of the state's concession in its brief that the issue is a mixed question of fact and law. *See* Supplemental Brief filed June 24, 1985, at 17.

[20] The state suggests there is contrary evidence, noting that some individuals made appeals for a fair trial for the four suspects. However, these appeals are subject to question. Almost all of the appeals for a fair trial were made in a context of an effort to calm down the community to avoid the fear of mob violence, or in a context of a desire that the trials be held in Seminole County and not transferred elsewhere, or in a context of following all the procedural steps, thus equating a fair trial with one in which the procedural steps were followed even if the outcome were a foregone conclusion. *See* editorial, *Donalsonville News*, May 2, 1973, *supra* at 11.

[21] Because of our disposition of the case, we need not address the argument that the district court on remand erred in excluding the proffer of expert testimony by Dr. Nobles analyzing the pretrial publicity.

[22] Although the defendant's televised confession in *Rideau* was not admitted in evidence at trial, oral and written confessions made on the night of his arrest were admitted in evidence. *See Rideau,* 373 U.S. at 730 (Clark, J., dissenting).

[23] In *Murphy v. Florida,* 421 U.S. 794, 800 n.4 (1975), the Supreme Court distinguished "mere familiarity with the petitioner or his past" from an "actual predisposition against him." The Court also noted the distinction between "largely factual publicity" and "that which is invidious or inflammatory." In *Murphy,* the Supreme Court found that the general community (metropolitan Dade County) atmosphere was not inflamed and that the publicity, which itself was largely factual in nature, had occurred almost entirely at least seven months before trial. By contrast, the instant record reveals a small rural county barraged with prejudicial publicity continuing up to the time of the trial, as well as other evidence, all as described in the text, *supra,* inescapably reflecting an atmosphere of predisposition as to the guilt and sentence.

The actual trial in this case was conducted by Judge Geer with decorum and dignity. Thus, there was no "circus atmosphere" which might have aggravated the atmosphere generated by the pretrial publicity, as in *Sheppard v. Maxwell,* 384 U.S. 333 (1966); and *Estes v. Texas,* 381 U.S. 532 (1965). To the contrary, the trial atmosphere here was a positive contribution to the totality of the circumstances.

[24] The question could also be posed as one of whether harmless error analysis should apply to the petitioner's change of venue claim. In its opinion on direct appeal, the Georgia Supreme Court noted that one reason for concluding that the trial judge did not abuse his discretion in denying the motion for a change of venue was that the state presented overwhelming evidence of the petitioner's guilt. The court also suggested that any error that may have existed would have been harmless because "no other verdict could have reasonably been returned by a jury regardless of the locale of the trial." *Coleman v. State,* 237 Ga. 84, 226 S.E.2d 911, 918 (1976), *cert. denied,* 431 U.S. 909 (1977). However, the constitutional guarantee of a fair trial before an impartial jury is a fundamental constitutional right which cannot be the subject of harmless error analysis. *See Rideau, supra* (implicitly so holding, since there was overwhelming evidence of Rideau's guilt); *Irvin v. Dowd,* 366 U.S.

at 722 (quoted in text *infra*). Moreover, as pointed out in the text, Georgia's sentencing scheme, which vests in the jury absolute discretion to grant mercy for any reason, renders it virtually impossible to apply the harmless error concept to the sentencing phase on the basis of overwhelming evidence.

[25] We do not read *Rideau* to imply that the voir dire cannot rebut a presumption of prejudice. The Supreme Court held that due process required that the defendant be granted a change of venue "without pausing to examine a particularized transcript of the voir dire examination of the members of the jury." *Rideau, supra,* at 727. It might be argued that the threshold showing required to presume prejudice is so high that any rebuttal is inconceivable. However, without expressly deciding the issue, we decline to read *Rideau* in this fashion, *see Mayola v. Alabama,* 623 F.2d 992, 1000 (5th Cir. 1980) (dicta) ("*Rideau* did not go so far as to indicate that voir dire had no role in the paradigm of presumptive prejudice"); *Pamplin v. Mason,* 364 F.2d 1, 6 n.9 (5th Cir. 1966), and we assume that there can be such a rebuttal.

[26] An example illustrating the inadequacy of the voir dire occurred in the companion case involving Dungee. *See Isaacs v. Kemp,* Nos. 82-8017, 85-8202 and 85-8277 (11th Cir.), published simultaneously with this opinion. The voir dire of juror Harrington was conducted by the parties, including Dungee's counsel, in a conclusory manner, as in this case, not conducive to eliciting the existence of exposure to prejudicial publicity or the existence or actual prejudice. No evidence of actual prejudice was elicited, and Harrington sat as one of the twelve jurors in Dungee's case. However, in a later evidentiary hearing, it was disclosed that juror Harrington had actually sat through most of the trial of Carl Isaacs, which trial took place in the week preceding Dungee's. It was established that juror Harrington heard Billy Isaacs testify in the Carl Isaacs trial (which testimony also implicated Dungee) and thus had been exposed to the most damaging evidence against Dungee before Dungee's trial ever began.

[27] No one familiar with the facts of this case and the overwhelming evidence of guilt could fail to have sympathy for the prolonged suffering of the families of these victims. The fatal error of trying this case in Seminole County was not their decision. Similarly, the unwarranted delay in the final disposition of this matter is not their fault.

However, under the law it is not relevant to the issues before us (and no one has suggested it is) how the responsibility for that delay is allocated or shared among the petitioner,

the state (see not 14 *supra*) and the system itself. Moreover, it is of small consolation to them that more recently there are beginning to be some improvements in the system itself with respect to such delay. Also the law requires that even the obviously guilty are entitled to a fair trial. Minimal standards of due process require a fair trial "regardless of the heinousness of the crime . . . [or] the apparent guilt of the offender." *Irvin v. Dowd*, 366 U.S. at 722.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8310

WAYNE CARL COLEMAN,

Petitioner-Appellant,

versus

RALPH KEMP, Warden Georgia Diagnostic and Classification Center,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 9, 1985, 11 Cir., 1985, —— F.2d ——).
(January 31, 1986)

Before JOHNSON, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

(✓) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

R. Lanier Anderson
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8202

GEORGE ELDER DUNGEE,

Petitioner-Appellant,

versus

RALPH KEMP, Warden,
Georgia State Prison,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 9, 1985, 11 Cir., 198—, —— F.2d ——).
(January 31, 1986)

Before JOHNSON and ANDERSON, Circuit Judges, and HUNTER*, District Judge.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

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* Hon. Edwin F. Hunter, Jr., U.S. District Judge for the Western District of Louisiana, sitting by designation.

Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

(✓) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

R. Lanier Anderson
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8017

CARL J. ISAACS and
GEORGE ELDER DUNGEE,

Petitioners-Appellants,

versus

RALPH KEMP, Warden,
Georgia State Prison,

Respondent-Appellee.

No. 85-8277

CARL J. ISAACS,

Petitioner-Appellant,

versus

RALPH KEMP, Warden,
Georgia State Prison,

Respondent-Appellee.

Appeals from the United States Diserict Court for the Middle District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 9, 1985, 11 Cir., 1985, —— F.2d ——).
(January 31, 1986)

Before JOHNSON and ANDERSON, Circuit Judges, and HUNTER*, District Judge.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

(✓) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

R. Lanier Anderson
United States Circuit Judge

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* Hon. Edwin F. Hunter, Jr., U.S. District Judge for the Western District of Louisiana, sitting by designation.

HILL, Circuit Judge, DISSENTING from denial of rehearing *en banc*, in which FAY, Circuit Judge, joins:

The court has ordered that these cases not be reheard *en banc*. From *that order*, I respectfully dissent.[1]

I do not presume to dissent from the panel's judgments ordering that the writs be granted in these cases. Had we proceeded, *en banc*, to the further analysis I suggest below, the judgments might well have been the same. I would make no judgment on the merits absent counselling which should be offered to the full court. In my view, however, the full court could and should take the opportunity

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[1]Dissents from orders denying rehearing *en banc* have proliferated in our court, *see, e.g., Bowen v. Kemp*, 778 F.2d 623 (11th Cir. 1985); *Stephens v. Kemp*, 722 F.2d 627, 628, 629 (11th Cir. 1983); *Jaffree v. Wallace*, 713 F.2d 614, 615 (11th Cir. 1983); *United States v. Hastings*, 704 F.2d 559, 560 (11th Cir. 1983); *Woodson v. Schweiker*, 671 F.2d 118 (5th Cir. 1982); *Debra P. v. Turlington*, 654 F.2d 1079, 1080, 1086 (5th Cir. 1981); *Gates v. Collier*, 641 F.2d 403 (5th Cir. 1981); *Dearborn Marine Service, Inc. v. Chambers & Kennedy*, 512 F.2d 1061, 1062 (5th Cir. 1975); *United States v. Miller*, 508 F.2d 588, 589 (5th Cir. 1975); *Allen v. City of Mobile*, 466 F.2d 122, 131 (5th Cir. 1972); *Novak v. Beto*, 456 F.2d 1303, 1304 (5th Cir. 1972), and in other courts of appeals, *see, e.g., Prejean v. Maggio*, 765 F.2d 482, 487 (5th Cir. 1985); *Dronenburg v. Zech*, 746 F.2d 1579, 1581 (D.C. Cir. 1984); *Williams v. Nix*, 700 F.2d 1164, 1175 (8th Cir. 1983); *Boraas v. Village of Belle Terre*, 476 F.2d 806, 824 (2d Cir. 1973); *Lee Fook Chuey v. Immigration & Naturalization Service*, 439 F.2d 244, 251 (9th Cir. 1971), to the point where the practice may be said to have become institutionalized. Its growth appears to have coincided with the increase in the number of published dissents from orders denying certiorari in the Supreme Court. Not all judicial officers have found the latter appropriate. *See Singleton v. Commissioner of Internal Revenue*, 439 U.S. 940, 942 (1978) (opinion of Stevens, J., respecting the denial of the petition for writ of certiorari). When the court has been polled on a petition for rehearing *en banc*, and a majority votes against, it may be appropriate that a simple order reciting that fact be the end of the issue. The proposition has sufficient merit that, were the practice of dissenting from such orders not now commonly accepted, I have no doubt that I would not initiate it.

that these cases provide to clarify an area of constitutional law that is presently murky.

I have little doubt that the state court should have ordered a change of venue in these cases. The administration of justice must be even-handed and should be so perceived. Were we considering these cases on direct appeal from convictions in a federal court, I have little or no doubt that, in the exercise of our supervisory power, they should be reversed. In these habeas cases, however, we are required to determine whether state court proceedings were constitutional—nothing more.[2]

It is clear to me that the panel undertook to exercise just this limited function. The panel obviously labored long and hard in the review of a massive record. The thorough re-creation of the publicity preceding the trials is a tribute to the court and to counsel. The judgment granting the writs rests upon the particular facts of these particular cases. We should, I submit, provide an analysis which would be helpful in future cases. Publicity—and the community feelings thereby expressed and engendered—should be more thoroughly analyzed for its constitutional significance than has been done in these cases or was done in *Rideau v. Louisiana*, 373 U.S. 723 (1963), the leading authority thus far in the field.

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[2]I think it important to note here a truism that is easily forgotten—that the Constitution only demands of a criminal trial that constitutional rights, including the right to due process of law, be respected. The right to a fair trial is only a right to due process of law, and does not include a right to advantages at trial that might aid a particular criminal defendant a great deal simply because of the overwhelming evidence against him. Thus a trial may appear very one-sided but yet be a fair trial, and not offend the Constitution, as long as the defendant is afforded the basic protections of due process of law.

The media plays an important role in our free society. I doubt that it would be contended that a well-informed forum is one that cannot conduct a constitutional criminal trial. When, if ever, does the accurate reporting of fact offend the administration of justice? I suppose that responsible media organizations and people would like to know. Clearly, judicial officers dedicated to the provision of fair trials would like to know. These issues are presented in these cases, and I regret our decision not to undertake a more helpful analysis.

The intensive review detailed in the panel opinion reveals several distinct categories of public reporting of what I take to be essentially accurate facts. Their accuracy, at least, is not questioned. I touch on a few of those categories. I suggest that we could and should analyze them separately.

The Crime

Initially, the media reported how the law had been broken. Six members of the community had been systematically murdered. One had, before her execution, been repeatedly raped. Much of what was said then and thereafter concerned the details of the criminal acts which had taken place. The crimes were horrible, and those who read about them or heard about them and reported upon them were outraged.

I submit that it is meet and proper that our society and its members be outraged at the commission of crimes such as were committed by the petitioners in these cases. A community ought not be constitutionally disqualified as a forum for the administration of criminal justice because its people are conscious of crimes committed in the com-

munity and outraged by them. It does not offend the Constitution for public awareness of the consequences of crime to be heightened by reports of crimes—whether multiple murders, distribution of controlled substances, or driving while under the influence of drugs or alcohol. We ought never leave the impression that the Constitution demands a forum where the people are not biased or prejudiced against criminal conduct. A juror need not feel "neutral" about whether or not people should rob banks in order to sit in judgment on one accused of bank robbery.

These cases could never be tried before a jury unaware of the horror of the offenses for which the petitioners were on trial. The facts of the crime will inevitably be made known to the jurors at any trial, anywhere. Moreover, I find nothing improper in concern, even anger, on the part of potential jurors about crimes such as those at issue in this case. The publicity reporting the murders of the members of the Alday family and the strong feelings of outrage in the community over those crimes should be treated differently than other types of publicity that might more plausibly have affected the outcomes of the trials. I believe this category of publicity should be given little, if any, weight in determining whether a criminal defendant has received a fair trial.[3] I acknowledge that our panel ap-

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[3]Strictly speaking, one can easily imagine a case in which publicity reporting certain facts of an incident that are entirely unrelated to a particular defendant might aid the prosecutor and prejudice the defendant on trial, by convincing the community from which the jury is drawn that a crime in fact occurred when the *corpus delicti* is in doubt. In the cases here under investigation, however, there can be no question that the prosecutor could not have been materially aided in proving the *corpus delecti* by the widespread publicity reporting the facts of these murders.

parently considered this category only to the extent that it found it to be evidence of prejudgement, contributing to a conclusion that the community was so inflamed that a fair trial could not be had. That may be proper. Yet, inasmuch as no jurors can serve in these cases, anywhere, without being immediately exposed to knowledge of the crimes, I feel that the full court should have reheard and, upon rehearing, determined whether or not any weight should be given to this community bias against crime.

The Accused

While bias and prejudice against crime does not, in my view, disqualify a community from administering justice in a case in which the state has accused an individual of committing a crime, bias or prejudice against the accused stands on a different footing. We should have, therefore, examined publicity about the accused—the petitioners here—as a separate category of publicity. Further, I would identify and distinguish within that category two subcategories of publicity—(1) information that later is made known to the jury at trial, and (2) information that is not.

(1)

It appears that, in the discharge of their responsibility, the media reported diligently upon the work of law enforcement officials investigating the crimes, including the apprehension of those suspected of committing them. Evidence leading to the arrests and indictment of these individuals was made public as it came to light. In this area, a tension often develops between free press and fair trial concerns. It might better serve our desire to ensure the clinical sterility that we feel is most likely to result in a

fair trial to allow no pre-trial reporting of the results of ongoing criminal investigations. Were that so, however, the people would suffer a lack of valuable information about whether public officials were discharging their responsibilities in a satisfactory manner. We tend in this nation to trust and believe in the value of an informed citizenry. In this case, the tension between free press and fair trial values was great, because the information obtained by law enforcement officials strongly supported the thesis that those arrested were in fact guilty.[4]

We should have analyzed and evaluated the significance of this kind of publicity as a subcategory of publicity that is distinct in important respects from the category first discussed above. I apprehend that we should have done so with this fact in mind: Most of that which was reported, second hand, by the media was later properly reported, in detail, by those with first hand knowledge of the facts, as testimony before the juries that heard the cases;[5] inevitably, it will be so reported to any jury, anywhere, if the cases are re-tried. It is entirely proper for the jury to be made aware of this kind of information. It is its wide dissemination in advance of trial that is perceived to be the problem. Such publicity may be likened to a premature

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[4]The panel opinion in *Coleman* acknowledged that "there was, in fact, overwhelming evidence of the petitioner's guilt adduced at trial." *Coleman v. Kemp,* No. 82-8310, slip op. at 1481 (11th Cir. 1985). This included principally the testimony of Billy Isaacs and fingerprint evidence that placed the petitioners at the scene of the crimes.

[5]It is not contended that these reports were not evenhanded. That is, the media did not report information tending to show guilt and suppress that tending to exonerate the defendants. There was simply none of the latter to report, and the defendants offered none at trial.

opening statement made by a prosecutor who says what the state will prove, but which is not proved save by evidence properly admitted at trial. Such pre-trial publicity should be appraised as a separate category from that which does not bear on the guilt or innocence of the defendants. Only after carefully examining each such item of publicity, aided by counsel, should we determine the weight it should be accorded in deciding whether a fair trial has been denied, perhaps placing heavy emphasis on whether the admitted information was disputed at trial. Here, again, the panel considered publicity in this category to the extent that it felt that the publicity demonstrated community prejudgment. The full court, by applying the analysis I suggest, could have attributed appropriate weight to it for future reference.

(2)

We should have taken particular note of that distinct subcategory of potentially prejudicial publicity concerning one or more of the defendants that was *not* admitted as evidence at trial. One defendant was said to have confessed to an earlier murder that occurred in Pennsylvania or Maryland. Unlawful earlier activities of the defendants said to have constituted a "crime spree" were reported. Although evidence of these events might properly have been introduced to show a motive for murdering the Aldays, who might otherwise have aided in the earlier apprehension of petitioners, or might have been introduced for some other reason at the sentencing hearing, it appears that they were not. Fair trial-free press tensions are most apparent in this area. When the law demands that certain facts—because they are not material and might prejudice the defendant, or because they have been suppressed to

vindicate important constitutional rights—be kept from jurors to insure a fair trial, yet they are widely reported in media that is read, heard and watched by potential jurors, a problem exists. The problem is not addressed by restraining the media; it is sometimes addressed by change of venue. Usually it is appropriately handled by proper instructions of the court to the jury, confining the jurors to the evidence admitted at trial. We should afford this subcategory of publicity the greatest weight in determining whether individuals such as the petitioners in this case have been denied a fair trial.

Precautions

Neither the media nor the state court was unaware of fair trial concerns. As the panel observed, at least one widely read newspaper reminded its readers in a front page editorial of the importance of ensuring that the defendants received a fair trial.[6] The panel also notes that

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[6]The editorial read in part as follows:

> There is a wide difference in the question of whether the people here could give the suspects a fair trial, and in our wanting to see the guilty ones punished and removed from being able to commit the same outrages again, a few years from now, on other innocent people.
>
> But our people want to be sure that the suspects now being held in jail are the ones who committed the crimes. We don't want to see four innocent men punished, if they should turn out to be innocent of the charges against them, and the other charges to come.

The editorial criticizes the "few screwballs among us who get a thrill out of talking dumb and sounding off about what all they'd like to do to the four men." It also notes that the surviving Aldays wished for justice to run its due course. The editorial concludes as follows:

(Continued on next page)

the trial in *Coleman*, and presumably in the other cases, was conducted "with decorum and dignity." slip op. at 1480 n. 23. The trial court judge put squarely to the venirepersons the question whether they could sit on the jury without bias or prejudice against the accused, and only those who, under oath, responded that they could do so were found qualified to serve.[7] As the panel recognized, this kind of voir dire is a time-honored and valued ingredient in our jury system; it ought not often be found insufficient. The full court should have given these precautions by the press and the trial court appropriate weight in the overall analysis.

Conclusion

In short, I feel strongly that the full court should have reheard these cases. The authority for the "presumed prejudice" analysis that was applied in this case is the Supreme Court's decision in *Rideau v. Louisiana*, 373 U.S. 723 (1963). We have failed to take advantage of the op-

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(Continued from previous page)

> And there's no room for error here. The only thing any kind of mob action, or inciting troublesome thoughts can bring is more sorrow.
>
> Think about this often, as the long, drawn-out trial days go slowly along. It's a hard fact of life, and there's no profit in forgetting it. The law must be obeyed.

As the panel opinion notes, "[t]he district court viewed [this] front-page editorial in the May 24 *Donalsonville News* as typical of the publicity surrounding the crime." *Coleman v. Kemp*, slip op. at 1425.

[7]It is suggested in the panel opinion in *Coleman* that the question there was not adequately put. *Coleman v. Kemp*, slip op. at 1482-84. Many potential jurors, however, candidly acknowledged their disqualification for bias. They apparently understood what they were being asked.

portunity provided by these cases to articulate a set of guiding principles to engraft upon the rather bare bones of that case. While the first amendment gives much license to the media, I apprehend that responsible men and women in that profession would be pleased to know our views in order that free press-fair trial tensions, although perhaps inevitable, might be lessened. Judges dealing with cases which attract media attention ought to have the benefit of an analysis they might adopt.

Had we reheard the cases, I would reach any final conclusions about this case only after counselling in the form of *en banc* briefs and argument. Presently, I apprehend that I would find nothing to criticize in reports of public outrage about the crime; little to criticize in factual reports of the investigation; much to concern me in widespread reports of information that is detrimental to any defendant and is not admissable at trial or sentencing; much to commend in public reminders of the importance of ensuring a fair trial; and much to credit in the voir dire responses of the jurors under oath. Nevertheless, as stated before, I am certainly not prepared to say that I would ultimately conclude that writs of habeas corpus ought not be granted in these cases.

The panel has, sincerely and with commitment to the Constitution, done much. The full court should have finished the job they have begun.

85-1652 (3)

No. .....

Supreme Court, U.S.
FILED
APR 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

RALPH KEMP, WARDEN,
Petitioner,

v.

WAYNE CARL COLEMAN,
CARL J. ISAACS, AND
GEORGE ELDER DUNGEE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

APPENDIX VOLUME II

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

CIVIL ACTION NO. 80-71-THOM

CARL J. ISAACS AND
GEORGE ELDER DUNGEE,

Petitioners

v.

CHARLES R. BALKCOM, WARDEN,
GEORGIA STATE PRISON,

Respondent

OPINION AND ORDER

(Filed October 22, 1981)

The Petitioners in the above styled case, Carl J. Isaacs and George Elder Dungee, were indicted by the grand jury of Seminole County, Georgia, for the offense of murder, six counts, on September 4, 1973. The Petitioners received separate jury trials, with Petitioner Isaacs being convicted of six counts of murder on January 3, 1974, and Petitioner Dungee being found guilty on all six counts of murder on January 9, 1974. As the jury at the trial of each Petitioner found statutory aggravating circumstances as to each count of murder, these Petitioners received the death penalty on each of the six counts with which they had been charged and convicted. Presently pending before this Court is the application for federal habeas corpus relief under 28 U.S.C. § 2254. Petitioners originally filed their joint habeas corpus petition under 28 U.S.C. § 2254 in the United States District Court, Southern District of Georgia, Savannah Division, on June 6,

1979, but their joint habeas corpus petition was transferred to this Court on November 25, 1980. In a stipulation entered into in the Southern District of Georgia on September 15, 1980, counsel for the parties agreed that Petitioners had complied with the doctrine of exhaustion of state remedies as required by 28 U.S.C. § 2254(b) and (c), and therefore, that issue is not one to be reviewed by this Court. An extensive procedural history was set out in this first stipulation by the parties and therefore, it is unnecessary for this Court to review again the procedural history of the Petitioners' cases in the body of this order.

Petitioners raise the following allegations in their original and amended petition for a writ of habeas corpus: (1) that the indictment returned against them failed to allege any of the statutory aggravating circumstances which must be proved beyond a reasonable doubt before capital punishment can be administered, thereby violating their rights to due process and equal protection under the Sixth Amendment, their right to be informed of the nature and cause of the accusation under the Sixth Amendment, and violating their rights to due process and equal protection under the Fourteenth Amendment because the convicting court exceeded its jurisdiction; (2) that Petitioners' rights under the due process and equal protection clauses of the Fourteenth Amendment were violated by reason of massive, prejudicial pretrial and trial publicity so as to deny them a fair trial in the proceedings which resulted in their convictions and so as to deny them an impartial and dispassionate consideration of punishment; (3) that their rights to due process under the Four-

teenth Amendment were violated by the trial court's instruction that, "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted"; (4) that the execution of Petitioners' death sentences is violative of their rights under the Sixth, Eighth and Fourteenth Amendments because of the Georgia statutory provisions governing appellate and sentence review in death penalty cases; (5) four allegations generally attacking the imposition of the death penalty per se, and specifically, under Georgia statutory law.

Petitioners' first allegation concerning the alleged violation of their constitutional rights because of the failure of the indictment to allege any of the statutory aggravating circumstances must fail for the same reason that a similar attack was rejected by the United States Court of Appeals for the Fifth Circuit in *Spinkellink v. Wainwright*, 578 F.2d 582 (5 Cir. 1978). Petitioners have failed, as did John Spinkellink, to cite any case, either federal or state, which requires the prosecutor to list in the indictment the aggravating circumstances on which he will rely in seeking the death penalty. *Id.* at 609. In fact, this Court notes that state law places no requirement that an indictment for a capital offense allege aggravating circumstances on which a prosecutor intends to rely in seeking the death penalty. See *House v. Stynchcombe*, 239 Ga. 222, 224 (1977); *Smith v. State*, 236 Ga. 12-20 (1976) and *Eberheart v. State*, 232 Ga. 247-253 (1974). Therefore, the decision reached by the state courts in considering this claim as stated in *Dungee, et al. v. Hopper*, 241 Ga. 236 (1978) was correct and this contention by the Petitioners must fail.

The second allegation raised by the Petitioners in their original petition for a writ of habeas corpus is the Petitioners were denied their constitutional rights under the due process and equal protection clauses of the Fourteenth Amendment because of what they contend was "massive and prejudicial" pretrial and trial publicity, which they allege denied them a fair trial in the proceedings which resulted in their convictions and denied them an impartial and dispassionate consideration of punishment. As noted in the stipulated procedural history, the Petitioners, along with co-indictee Wayne Coleman, filed motions for change of venue in the Superior Court of Seminole County, alleging that pretrial publicity had so prejudiced the minds of prospective jurors that Petitioners could not receive a fair trial by an impartial jury in Seminole County, Georgia. Consolidated hearings on the motions were held on September 27 and October 9, 1973.

Documentary evidence and the testimony of three witnesses were introduced in support of Petitioners' motions for change of venue. The Superior Court of Seminole County denied these motions for change of venue on October 9, 1973. Following Petitioners' trials and convictions the Petitioners and Wayne Colman pursued separate direct appeals to the Supreme Court of Georgia in which they alleged as one of their enumerations of error that the Superior Court of Seminole County erred when it denied a change of venue. On the direct appeal of Wayne Coleman and the Supreme Court of Georgia extensively reviewed the issue of whether a change of venue should have been granted and concluded that the Superior Court of Seminole County did not abuse its discretion or violate due process in denying a change of venue. See *Coleman*

v. State, 237 Ga. 84 (1976). Although in the direct appeal of Petitioner Isaacs the Supreme Court of Georgia did not again go through an extensive review of this issue, the Court noted that the same legal issues which had been reviewed in the Coleman case had also been considered in this case. Similarly, in the direct appeal of Petitioner Dungee, the allegation concerning the motion for change of venue was determined to be without merit for the same reasons as were given in the appeal of Wayne Coleman.

Petitioners also raised the issue of alleged prejudicial pretrial publicity in their state habeas corpus petition in the Superior Court of Tattnall County, but because of Respondent's objection that certain selected newspaper clippings were not authenticated additional evidence was not presented to the state habeas corpus court on this issue. Following the denial of relief by the state habeas corpus court the Supreme Court of Georgia again reviewed the issue of alleged prejudicial pretrial publicity and determined that because the issue had been thoroughly reviewed by the court in the original appeals of the Petitioners that it would not be reconsidered. See *Dungee v. Hopper*, 241 Ga. 236 (1978).

After filing their applications for federal habeas corpus relief under 28 U.S.C. § 2254, Petitioners filed a motion for discovery pursuant to Rule 6 of the rules governing § 2254 cases in the United States District Courts. Petitioners' discovery motions were granted by the United States District Court for the Southern District of Georgia and the completion of this discovery by counsel for the Petitioners was allowed following the transfer of Petitioners' habeas corpus action to this Court. Newspaper

clippings and numerous depositions of representatives of broadcast and print media were introduced for this Court's consideration, as well as the affidavit of a demographer about the population characteristics of Seminole County, Georgia. This evidence was received and considered by this Court, in lieu of an evidentiary hearing on this issue. Although Petitioners urge that this case should be remanded back to the state courts for consideration of Petitioners' claims in light of the expanded factual record, this Court declines to remand this case for the reasons which will be hereinafter set forth.

This Court is required under 28 U.S.C. § 2254(d) to apply the "presumption of correctness" to factual determinations made by the state courts unless one of the seven circumstances set forth in this statute are shown by the applicant, admitted by the Respondent, or otherwise appear. See *Sumner v. Mata*, 446 U.S. 1302, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). However, the United States District Court for the Southern District of Georgia allowed Petitioners to supplement the record pursuant to discovery on the issue of prejudicial pretrial publicity. It appears from the Petitioners' final brief submitted to this Court that Petitioners contend that relief should be granted by this Court because actual prejudice invaded the jury box, for which principle they cite *Irvin v. Dowd*, 366 U.S. 717 (1961), or that relief should be granted because the atmosphere in which the trial was conducted was so inherently prejudicial that a fair trial could not be achieved, for which proposition Petitioners cite, *inter alia*, *Rideau v. Louisiana*, 373 U.S. 723 (1963).

The test set forth for determining whether an accused was denied his right to a fair trial by a panel of impartial

jurors, as set forth in *Irvin v. Dowd, supra,* is whether jurors can lay aside their impressions or opinion and render a verdict based on the evidence presented in court. See *Irvin v. Dowd,* 366 U.S. 717 at 722-723 (1961). The often quoted portion of the decision of the Supreme Court of the United States in *Irvin v. Dowd, supra,* is that portion of the court's opinion stating that it does not require that jurors be totally ignorant of the facts and issues involved and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. *Id.* at 722-723.

This Court has reviewed the extensive voir dire proceedings in both the Petitioners' trials and finds that Petitioners have not demonstrated prejudice under the *Irvin v. Dowd* standard. Petitioners cannot establish that "prejudice found its way in the jury panel" as found in *Pamplin v. Mason,* 364 F.2d 1, 6 (5 Cir. 1966). Therefore, this Court must determine based on the expanded record whether or not Petitioners have established that "presumption of prejudice" utilized by the Supreme Court of the United States in *Rideau v. Louisiana,* 373 U.S. 723 (1963). The test set forth for determining whether prejudice may be presumed under *Rideau v. Louisina, supra,* was recently reiterated in *Mayola v. Alabama,* 623 F.2d 992 (5 Cir. 1980). The Court of Appeals for the Fifth Circuit quoted the following as being the standard set forth by the Supreme Court of the United States in *Rideau v. Louisiana*:

> ". . . Where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from

> that community, '[jury] prejudice is presumed and there is no further duty to establish bias.' "
>
> *Mayola v. Alabama,* at 997.

This Court notes as the Court of Appeals for the Fifth Circuit did in *Mayola v. Alabama,* that the *Rideau* principle of presumptive prejudice is only rarely applicable. See *Mayola v. State of Alabama,* 623 F.2d 992, 997 (1980), citing *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976).

Counsel for the Petitioners have presented this Court with a greatly expanded record which they contend supports a finding of presumptive prejudice. Attached to their final brief they have attached a graph outlining the number of column inches of publicity concerning this case, which was presented to the court, from the date upon which the crimes occurred through the conviction of Petitioner Dungee. However, this Court must go further in its inquiry than looking at the amount of publicity which these crimes generated, as it is not the amount of publicity alone which determines whether prejudice may be presumed, but rather, the nature of such publicity which determines whether the principle of *Rideau v. Louisiana, supra,* may be applied. The Petitioners also claim that the content of the pretrial publicity is sufficient to support a finding of presumptive prejudice.

This Court has carefully reviewed the extensive record presented to this Court on this issue. There was a large amount of media coverage of the crimes and the Petitioners prior to their trials, but this Court concludes that a review of the record as a whole does not support a finding of "pervasive prejudicial publicity" of the type

required under the *Rideau* standard. See *Mayola v. State of Alabama*, 623 F.2d 992, 998-999 (5 Cir. 1980) and *Bronstein v. Wainwright*, 646 F.2d 1048 (5 Cir. 1981). This Court concludes that none of the Petitioners' constitutional rights were violated in connection with this allegation.

Much of the evidence presented by the Petitioners in support of their contention was stipulated to by the Respondent and there is therefore no need to remand this case to the state courts for further findings of fact. Additionally, Petitioners and Respondent have stipulated that there has been exhaustion of this issue in the state courts and notions of comity do not require a remand to the state courts for consideration of an issue which has twice been reviewed by the Supreme Court of Georgia, first on direct appeal from Petitioners' conviction and again in reviewing the findings of the state habeas corpus court. The issue is properly before this Court and this Court can apply the applicable federal legal principles to the facts as developed in the record in the state court which has been supplemented in the district court.[1]

Petitioners contend that the trial court's instruction that "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted" violated the due process clause of the Fourteenth Amendment and the

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[1]In any event, remand to the state courts for consideration of this issue in light of additional evidence would result only in further delay in the resolution of this issue, as it is likely that any subsequent habeas corpus petition filed in the state courts, would be dismissed as successive.

principles set forth by the United States Supreme Court in *Sandstrom v. Montana,* 442 U.S. 510 (1979). A perusal of the trial transcript reveals no language similar to that in *Sandstrom v. Montana, supra,* which would operate so as to create the impermissible "conclusive presumption" found to be constitutionally deficient in *Sandstrom v. Montana, supra.*

Petitioners' final allegations raised in their amended petition for a writ of habeas corpus can be summarized as general attacks on the imposition of the death penalty in general, and under the Georgia statute, specifically. Of course, in *Gregg v. Georgia,* 428 U.S. 153 (1976), the Supreme Court of the United States held that the imposition of the death penalty in Georgia, by means of the present bifurcated procedure, was not violative of the Eighth and Fourteenth Amendments. Additionally, the Court of Appeals for the Fifth Circuit in *Spinkellink v. Wainwright,* 578 F.2d 582 (5 Cir. 1978), held that "capital punishment is not unconstitional per se, and that a state, if it chooses, can punish murderers and seek to protect its citizenry by imposing the death penalty—so long as it does so through a statute with appropriate standards to guide discretion." *Id.* at 605.

Petitioners allege that the Georgia statutory procedure governing appellate and sentence review of death penalty cases violates certain of their constitutional rights. This Court notes that the Supreme Court of Georgia did conduct a sentence review in the Petitioners' cases on their direct appeals pursuant to Ga. Code Ann. § 27-2537(c)(1-3). See *Isaacs v. State,* 237 Ga. 105 (1976) and *Dungee v. State,* 237 Ga. 218, 220 (1976). As the statute under

which this sentence review was conducted has been upheld as constitutional by the Supreme Court of the United States and Petitioners have shown no violation of the appellate court statutory duty so as to amount to a violation of their constitutional rights, this allegation is without merit.

Next, Petitioners allege that the death penalty in the State of Georgia is applied "arbitrarily, capriciously, wantonly and freakishly" and also, that the statute is imposed pursuant to a pattern or practice of invidious discrimination on grounds of race, sex, and social or economic status. This allegation is also without merit on the basis of *Spinkellink v. Wainwright*, 578 F.2d 582 (5 Cir. 1978). This Court is unconvinced that the study made by Professors Bowers and Pierce or the transcription of the proceedings in *House v. Balkcom* and *McCorquodale v. Stynchcombe*, require any different finding by this Court than was concluded by the Court of Appeals for the Fifth Circuit in *Spinkellink v. Wainwright, supra.* Additionally, Petitioners have not shown any specific act of discrimination against them or that the facts and circumstances of their cases are so clearly undeserving of capital punishment, that to impose it would be patently unjust and would shock the conscience. See footnotes 28 and 40 of *Spinkellink v. Wainwright, supra.* These allegations by the Petitioners are without merit. Finally, Petitioners allege that the method of execution, *i.e.*, electrocution, is violative of their constitutional rights to be free from cruel and unusual punishment. This claim must also be rejected. See *Spinkellink v. Wainwright*, 578 F.2d 582, 616 (1978).

CONCLUSION

WHEREFORE, for all of the above reasons, it is ordered that Petitioners' application for federal habeas corpus relief under 28 U.S.C. § 2254 is hereby denied.

This 22nd day of October, 1981.

/s/ J. Robert Elliott
United States District Judge

Mr. Girard W. Hawkins, Clerk
U.S. District Court
P.O. Box 128
Macon, GA 31202

No. 82-8017 CARL J. ISAACS AND GEORGE ELDER DUNGEE V. WALTER D. ZANT, Warden, Georgia Diagnostic and Classification Center

(U.S.D.C. No. CA80-71)

Dear Mr. Hawkins:

Enclosed is a certified copy of an opinion-order this day entered by the Court in the above-referenced cause which is self-explanatory.

Returned herewith are the 2 volume record on appeal, the 1 volume first supplemental record on appeal, the 1 volume second supplemental record on appeal, the 1 volume third supplemental record on appeal and the 1 box of exhibits.* When they have served your purpose, please return them to this office, together with any supplemental record that may be prepared.

This case will be held in abeyance for a period of 60 days from this date pending disposition of the remand proceedings.

Please acknowledge receipt on the attached copy of this letter.

Very truly yours,
NORMAN E. ZOLLER,
Clerk

By /s/ Abagail H. Burr
Deputy Clerk

/ahb
enclosures

cc and enclosures to:
Honorable J. Robert Elliott
Messrs. James C. Bonner, Jr. and Thomas J. Killeen
Ms. Susan V. Boleyn√

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* The entire record in this case will be forwarded immediately to your office when it is received in our office.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-8017

CARL J. ISAACS and GEORGE ELDER DUNGEE,

Petitioners,

v.

WALTER D. ZANT, Warden, Georgia
Diagnostic and Classification Center,

Respondent.

Appeal from the United States District Court
For the Middle District of Georgia

(June 21, 1983)

Before JOHNSON and ANDERSON, Circuit Judges, and HUNTER*, District Judge:

PER CURIAM:

Petitioners, Carl J. Isaacs and George Elder Dungee, appeal from the federal district court's denial of their habeas corpus petitions.[1] Isaacs, Dungee, and Wayne Carl Coleman were tried separately, convicted, and sentenced to death for their joint participation in six murders. Before the trials began, all three petitioners filed motions for a change of venue. The state trial court held hearings on their motions, consolidated into one proceeding. After the hearings, the trial court denied these motions.

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* Hon. Edwin F. Hunter, Jr., U.S. District Judge for the Western District of Louisiana, sitting by designation.

[1] The district court had granted the motion for consolidation of the habeas corpus proceedings of Isaacs and Dungee. Record, vol. I, at 53.

The companion case of *Coleman v. Zant*, No. 82-8310 (11th Cir. June 10, 1983), has been remanded for an evidentiary hearing on the question whether pretrial publicity and the community's atmosphere were so prejudicial and inflammatory that the trial court's refusal to grant petitioner's motion for a change of venue deprived him of his constitutional rights. With respect to the change of venue issue, the facts in *Coleman v. Zant* are nearly identical to the facts in this appeal. Isaacs, Dungee, and Coleman were indicted for the same crimes, and tried *seriatim* in the same community in January 1974.

On June 10, 1983, we ordered respondent to show cause why this court should not take judicial notice of the proceedings before this court in *Coleman v. Zant, supra,* and remand this case also for an evidentiary hearing on the change of venue issue. Having carefully considered respondent's response[2] to the show cause order, we order a limited remand.

Since the facts relevant to the change of venue issue are nearly identical to those in *Coleman v. Zant,* since the close relationship between these two cases has been recognized and the record in each case has been supplemented on several occasions with portions of the other record, and since this limited remand will cause only a brief delay, we

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[2] Respondent argues that petitioners have not made the showing required by *Townsend v. Sain,* 372 U.S. 293 (1963), that "material facts were not adequately developed at the state court hearing." 372 U.S. at 313. However, that bridge was crossed in the district court where it was either demonstrated or agreed that further evidentiary development in federal court was necessary. The only comity consideration implicated by our decision to order a limited remand is the brief delay involved, which is amply justified in the interests of justice.

conclude that the interests of justice and judicial economy and the expeditious handling of this case require a remand for further development of this issue at an evidentiary hearing.[3] We retain jurisdiction and remand for this limited purpose. The district court shall certify its findings and the record of its proceedings on remand to us on or before August 9, 1983.

REMANDED WITH INSTRUCTIONS.

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[3] Although the management of hearings below are within the discretion of the district court, we contemplate that the district court will want to consolidate the evidentiary hearing herein ordered with that portion of the *Coleman v. Zant* hearings dealing with the same issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

CIVIL ACTION NO. 80-71-THOM

GEORGE ELDER DUNGEE,

Petitioner,

v.

WALTER ZANT, WARDEN,

Respondent.

MEMORANDUM AND ORDER ON PETITIONER'S MOTION FOR LEAVE TO AMEND PETITION FOR WRIT OF HABEAS CORPUS

(Filed February 11, 1985)

The Petitioner in the habeas corpus matter above identified has filed a motion for leave to amend his petition for a writ of habeas corpus previously filed in this Court. The Respondent opposes the motion. The Court determines that the motion should be denied for the reasons hereinafter stated.

Petitioner was convicted on six counts of murder in the Superior Court of Seminole County, Georgia in September, 1973. He first sought post-conviction relief by means of a petition for writ of habeas corpus filed in the Superior Court of Tattnall County, Georgia in February, 1977. This petition was denied on August 31, 1977, and the Supreme Court of Georgia affirmed the denial of state habeas corpus relief in *Dungee v. Hopper*, 241 Ga. 236 (1978). A petition for a writ of certiorari to the Supreme Court of the United States was denied on October 2, 1978. *Isaacs, et al v. v. Hopper*, 439 U.S. 882 (1978).

The Petitioner next filed an application for federal habeas corpus relief in the United States District Court for the Southern District of Georgia in May, 1979. That petition was consolidated with an application filed on behalf of Carl J. Isaacs by order dated July 9, 1979. The Petitioner and his Co-Petitioner Isaacs filed amended petitions for writs of habeas corpus on July 12, 1979, and a supplemental answer-response was filed by the Respondent on August 2, 1979.

The United States District Court for the Southern District of Georgia granted a motion for discovery filed on behalf of Petitioner Dungee and his Co-Petitioner on October 26, 1979. On November 25, 1980 the United States District Court for the Southern District ordered Petitioner's federal habeas corpus action be transferred to this Court because the Judge for the Southern District of Georgia was of the opinion that he should be disqualified from hearing the case.

After considering all of the evidence which had been developed before the Southern District of Georgia and allowing the submission of certain other items of evidence for this Court's consideration this Court entered an order on October 22, 1981 denying Petitioner Dungee's application for federal habeas corpus relief. On appeal to the United States Court of Appeals for the Eleventh Circuit that court remanded the case to this court for an evidentiary hearing. *Isaacs and Dungee v. Zant*, 709 F.2d 634 (11 Cir. 1983).

An extended evidentiary hearing was conducted in this case during the week of November 5, 1984, and presently post-hearing briefs for the resolution of all issues

before the Court are due for submission to this Court later this month (February, 1985).

While Petitioner's application for federal habeas corpus relief was pending on remand to this Court Petitioner filed a successive state habeas corpus petition in June, 1984. At that time this case had been pending in this Court on remand for approximately a year. An evidentiary hearing was conducted in the Superior Court of Butts County, Georgia, but Respondent's motion to dismiss the petition for a writ of habeas corpus pursuant to O.C.G.A. § 9-14-53 was granted by the Superior Court of Butts County, Georgia, that court finding that all of the grounds relied upon could reasonably have been raised in the original state habeas corpus petition filed on behalf of Petitioner in the Superior Court of Tattnall County, Georgia. The Petitioner filed an application for a certificate for probable cause to appeal to the Supreme Court of Georgia from the dismissal of the successive state habeas corpus petition, which application was denied on November 7, 1984.

It is clear that all of the allegations raised by the petition could have been raised in the first habeas corpus petition filed in the Superior Court of Tattnall County, Georgia, and certainly could have been raised in Petitioner's first application for federal habeas corpus relief or in the first amendment to the application for federal habeas corpus relief filed in July, 1979. The Court also determines that the reasons urged by Petitioner as a basis for the allowance of this amendment do not constitute a sufficient excuse for the extreme untimeliness of this proposed amendment to a petition which has already been amended upon a previous occasion and where the State has found that Petitioner has waived his rights under state law to present these issues on their merits.

In summary, the Court determines that for the Court to allow such an untimely amendment after the submission of all evidence would be to sanction an abuse of the writ of habeas corpus by means of an untimely amendment which essentially constitutes a successive application for federal habeas corpus relief. It is, therefore, the order of the Court that the motion for leave to amend be and the same is hereby disallowed.

This 11th day of February, 1985.

/s/ J. Robert Elliott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

CIVIL ACTION NO. 80-71-THOM

CARL J. ISAACS and
GEORGE ELDER DUNGEE,

Petitioners,

v.

WALTER D. ZANT, WARDEN,
Georgia Diagnostic and Classification Center,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO REMAND

(Filed March 18, 1985)

On May 15, 1973 four men entered the Alday residence in a rural county in southwest Georgia for the purpose of burglary. Two members of the Alday family came home and were shot to death with hand guns. One of them was shot seven times in the head, the other four times in the head. Later a brother arrived. He was killed with a hand gun. Then the wife of one of the earlier victims arrived. She was shot. Two other family members then came home and both of them were killed. The wife was then raped by two (or more) of the men, bound and blindfolded, driven to a wooden area and raped again, beaten and mutilated. She was then killed with two shots. Her watch was removed from her nude body.

The Petitioners above named were two of the four men. They were brought to trial in January, 1974, and were convicted on six counts of murder. Although more

than eleven years have passed since their convictions they have not yet been punished.

In *Furman v. Georgia,* 408 U.S. 238 (1972), Justice Potter Stewart said:

> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law." p. 308.

Columnists and commentators who with increasing frequency are discussing the reasons for the growing public criticism of the courts might feel that they would be justified in using the history of this case as "Exhibit A". Although the evidence of the guilt of the Petitioners was overwhelming, lawyers who did not represent them at trial, while knowing that a "perfect trial" is hardly ever possible, have nevertheless equated a "fair trial" with a perfect trial and have for more than eleven years filed numerous appeals and petitions seeking the reversal of the convictions or a modification of the sentences imposed and these efforts have had the attention of the state courts and the federal courts at all levels. This is the second time this Court has been called upon to review this matter. On the first occasion this Court denied the relief sought. This Court's order was the subject of an appeal to the United States Court of Appeals for the Eleventh Circuit, one of the grounds for appeal being the contention that the Defendants had not been given ample opportunity

to develop evidence which would demonstrate that they had not had a fair trial because of prejudicial pretrial publicity, in other words, that they were simply the victims of a "bad press". The Court of Appeals remanded the case to this Court with direction that the Defendants be given an opportunity to develop the evidence on this issue.

In compliance with the remand order referred to, this Court has allowed extensive discovery in this case on the issue of alleged pretrial publicity, including the submission of evidence in the form of depositions, documentary evidence, affidavits and live testimony, culminating in a final evidentiary hearing consuming some four days.

Considering the passage of so much time since the events which are the subject of this inquiry, it is not surprising that counsel for the parties and the Court have experienced some difficulty in obtaining a well-rounded description of the nature of the newspaper, television and radio coverage. Counsel for Petitioners have obtained some newspaper articles not previously submitted in this case, have substituted copies of articles already received into evidence and have sought out various media sources which might provide information on the coverage given in Seminole County, which is the scene of the events referred to.

The Court does not deem it necessary to list the identities of all of the witnesses who appeared nor identify with particularity all of the documentary evidence which was produced, but the Court does state that testimony presented and the documentary evidence which was produced have been reviewed in their entirety and serve as the basis for the findings of fact herein made.

In considering the evidence offered on the issue of alleged prejudicial pretrial publicity this Court has been guided by the comments made by the Court of Appeals in the remand order on the appropriate standards to be followed in reviewing such a claim, including the standards set forth in *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Murphy v. Florida*, 421 U.S. 794, 799 (1975); and *Mayola v. Alabama*, 623 F.2d 992 (5 Cir. 1980), *cert. denied*, 451 U.S. 913 (1981). Additionally, this Court examined this allegation of alleged prejudicial pretrial publicity in light of the decision of the Court of Appeals for the Fifth Circuit in *Calley v. Callaway*, 519 F.2d 184 (1975), and in light of the recent decision of the Supreme Court of the United States in *Patton v. Yount*, — U.S. —, 104 S.Ct. 2885 (1984). In light of these cases and the instruction of the Court of Appeals in its remand order, Petitioners have now had a full and fair opportunity to develop the facts material to this constitutional claim.

As has heretofore been noted in earlier orders of this Court in this case, a hearing was held in the Superior Court of Seminole County, Georgia, concerning Petitioners' motion for change of venue on September 27 and October 9, 1973. The hearing on the motion was consolidated with the motion of coindictee Wayne Coleman. The Superior Court denied the motion for change of venue on October 9, 1973. Following Petitioners' trials and convictions Petitioners Isaacs and Dungee and coindictee Coleman pursued separate appeals to the Supreme Court of Georgia in which they alleged as one of their enumerations of error that the Superior Court erred when it denied their

motions for change of venue. In Petitioners' appeals to the Supreme Court of Georgia that Court extensively reviewed the issue of whether or not a change of venue should have been granted and concluded that the Superior Court of Seminole County did not abuse its discretion or violate due process in denying a change of venue. *See Isaacs v. State,* 237 Ga. 105 (1976), and *Dungee v. State,* 237 Ga. 218 (1976).

In addition to developing the issue of alleged prejudicial pretrial publicity by means of a motion for change of venue filed prior to trial, Petitioners also raised this issue in state habeas corpus petitions filed in the Superior Court of Tattnall County. Petitioners Isaacs and Dungee had a consolidated state habeas corpus hearing on April 12, 1977 and relief was denied by the Superior Court of Tattnall County on August 31, 1977. A consolidated application for certificate of probable cause was granted by the Georgia Supreme Court. The Supreme Court affirmed the denial of habeas corpus relief to both Petitioners in *Dungee, et al. v. Hopper,* 241 Ga. 236 (1978).

The evidence before the trial court on the motions for change of venue as well as the decision of the Supreme Court of Georgia assumes even more importance in this Court's determination in light of the holding in *Patton v. Yount, supra,* that the presumption of correctness is applicable to a determination that a juror can be impartial. In deciding the Isaacs and Dungee appeals the Supreme Court of Georgia adopted its order in the companion case of *Coleman v. State,* 237 Ga. 84 (1976), in which the Court reviewed the voir dire transcript and found that, " . . . we cannot conclude that the trial court abused its discretion in overruling the motion for a change of venue. During the

voir dire examination there was no showing that the jurors summoned to try the appellant's case had formed such a fixed opinion as to either the guilt or the innocence of the appellant based on news media accounts of the homicides". *Coleman v. State, supra,* at p. 90. *See also Coleman v. State, supra,* at p. 88-89.

Reviewing the voir dire examination in light of the expanded record now before this Court, this Court again concludes that although it is clear that there was widespread knowledge of the fact that there had been a murder of six members of the Alday family in the Seminole County community, Petitioners have failed to show that they were denied their right to a fair trial by a panel of impartial jurors in light of the tests set forth in *Irvin v. Dowd, supra,* i.e., whether jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court. *Irvin v. Dowd, supra,* at 722-723. The often quoted portion of the decision of the Supreme Court in *Irvin v. Dowd, supra,* states that it is not required under this standard that jurors be totally ignorant of the facts and issues involved and also notes that scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. *Id.* at 722-723.

In the circumstances here presented the decision of the Court of Appeals for the Fifth Circuit in *Calley v. Callaway,* 519 F.2d 184 (1975), is quite instructive. Lt. Calley was convicted of participation in the so-called "My Lai massacre" and he later sought habeas corpus relief based on the same contention now made by the Petitioners in this case, i.e., that massive and intense pretrial publicity had made it impossible for him to obtain a fair trial.

After full evdentiary hearing the District Court concluded that Calley had been persecuted and pilloried by the news media so intent in making prejudicial revelations about the My Lai incident that Calley's right to a fair and unbiased hearing was impossible at the time the trial was conducted. The Court's review led it to conclude that the publicity was clearly improper, largely biased and undoubtedly prejudicial. It was the Court's finding that it was not humanly possible for the jurors not to be improperly influenced by prior exposure and that no person, however honest minded he might try to be, could avoid the lasting emotional impact of some of the publicity, and that with all the publicity given the incident and Calley's alleged involvement, it would be sheer fantasy to believe that the jurors did not see, hear and read the publicity or that they were not influenced by it. These findings led the District Court to hold the publicity inherently prejudicial to Calley's Sixth Amendment rights. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974).

Citing *Irvin v. Dowd*, the Court of Appeals for the Fifth Circuit reversed the District Court, and in doing so stated:

> "The district court emphasized that the case involved 'massive' and 'intense' publicity. Yet this court has noted previously that '[W]e cannot accept the position that "prominence brings prejudice." *Hale v. United States, supra*, 435 F.2d at 747. Moreover, no court has held that the only impartial juror is an uninformed one. We cannot expect jurors to live in isolation from the events and news of concern to the community in which they live.
>
> It is not required, however, that the jurors be totally ignorant of the facts and issues in-

> volved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.
>
> *Irvin v. Dowd, supra,* 366 U.S. at 722-723, 81 S.Ct. at 1642-1643."

The contentions made by Isaacs and Dungee in this case exactly parallel the contentions made by Calley in his case and the pretrial publicity in the Calley case was far more massive and opinionated than the pretrial publicity in this case. So, we are led ineluctably to conclude that the Petitioners in this case cannot prevail on their contention that they were denied a fair trial because of prejudicial pretrial publicity.

Therefore, this Court certifies as a conclusion of law that it reaffirms that portion of its opinion in this case dated October 22, 1981 in which this Court found that Petitioners had failed to establish "actual prejudice", as that standard has been interpreted and applied. This Court stresses that not only was the voir dire proceeding reviewed once again in making this determination, but that the expanded record before the Court on remand was considered in determining whether the standards of *Irvin v.*

Dowd, supra, had been violated. This allegation deserves no further treatment here, as the decision of the Supreme Court of Georgia and earlier opinions of this Court discuss the voir dire proceedings. Further reference to the record before this Court is not necessary in order to squarely certify this Finding of Fact and Conclusion of Law to the Court of Appeals for the Eleventh Circuit.

In making the determination of no "actual prejudice", the Court not only considered the applicable federal principles involved, but also considered the requirement of Georgia law, as contained in former Ga. Code Ann. § 27-1201; O.C.G.A. § 17-7-150, which requires that there should be a change of venue in a criminal case where either one of two situations exist, i.e., where an impartial jury cannot be obtained, or where there is a probability of danger or violence. This Court determines that Petitioners have failed to show that an impartial jury could not be obtained under the "actual prejudice" standard, and now turns to whether or not Petitioners should prevail under an application of the "presumed prejudice standard", or under that provision of Georgia law which requires a change of venue based on a probability of danger or violence.

It is appropriate to recall at this point that evidence introduced before the trial court on the original motion for change of venue filed on behalf of Petitioners and their coindictee is now also before this Court, and this evidence includes fourteen issues of the *Donalsonville News*, the local newspaper; 28 articles from the *Albany Herald*, 24 issues of the *Dothan Eagle;* and 3 magazine articles, all carrying stories from the discovery of the crime on May 15, 1973, through the pretrial hearing on the motions for change of venue.

Turning to an analysis of the evidence before this Court under a "presumed prejudice" standard, we note that Petitioners' assertion that they were denied their constitutional rights due to alleged prejudicial pretrial publicity appears to center around the allegation that due to the nature of the crimes, the nature of the community, the nature of the victims, the volume of pretrial publicity from various media sources, and the content of this pretrial publicity, prejudice to the Petitioners should be presumed, even absent a showing of actual prejudice by reference to the panel of jurors selected to try the Petitioners.

The "presumptive prejudice" standard was promulgated by the Supreme Court in *Rideau v. Louisiana,* 373 U.S. 723 (1963), and the test was recently reiterated in *Mayola v. Alabama,* 623 F.2d 992 (5 Cir. 1980).

Expert witnesses presented at the final evidentiary hearing provided relevant evidence concerning the characteristics of the community and a summarization of the sources and types of media coverage given to the murders, and the available evidence at this time concerning publicity about the murders during the relevant time period. Citizens of Seminole County and reporters who were familiar with this part of the state also provided the Court with information about the nature of the community, all of which was considered by the Court in determining whether or not prejudice should be presumed.

However, the Court declines in this order, as it did during the final evidentiary hearing in this matter, to consider the offer of proof made with regard to Petitioners' expert witnesses as to the conclusions that they would draw about the nature of the publicity concerning the Al-

day murders, i.e., whether the publicity was "inflammatory", "prejudicial", or whether the publicity evidenced a "huge . . . wave of public passion". *See Patton v. Yount, supra.* The Court deems these matters to be factual conclusions that must be made by this Court, in light of the applicable case law, in determining whether Petitioners have been denied their right to a fundamentally fair trial.

From the evidence presented, in its many forms as above described, the Court makes the following Findings of Fact with specific reference to the allegation of presumed prejudice:

There was widespead knowledge among the citizens of Seminole County of the fact that six members of the Alday family, a well-known family in the Seminole County community, had been murdered. It appears from the evidence received from citizens, reporters and expert witnesses, that much of the knowledge about the crimes in this small, rural community may have resulted from word-of-mouth communication. Additionally, the evidence reveals the following *primary* media sources in Seminole County at the time the crimes were committed: (1) the *Donalsonville News,* a weekly newspaper published in the county seat of Seminole County every Thursday; (2) the *Albany Herald,* published in nearby Albany, Georgia (approximately 40 miles from Donalsonville, Georgia); (3) the *Bainbridge Post-Searchlight,* a newspaper published in nearby Bainbridge, Georgia; (4) the *Dothan Eagle,* a newspaper published in nearby Dothan, Alabama; (5) the *Atlanta Journal/Constitution* (to a limited extent, as reflected in evidence before the Court); (6) WSEM, the local radio station in Donalsonville, Georgia; (7) tele-

vision stations in Albany, Georgia; Tallahassee, Florida; and Dothan, Alabama; (8) radio stations in Albany, Georgia, and Bainbridge, Georgia, which could be received to some extent in Seminole County, Georgia; (9) the Georgia Network News, a service apparently utilized during the relevant time period by only one radio station received in Seminole County, Georgia; and (10) reports from Associated Press and United Press International, which may have been utilized by some of the above named radio stations and television stations, as well as by some of the newspapers printing stories concerning the murders.

As revealed by testimony and an examination of the publicity from the various news sources cited above, the initial reaction of Seminole County citizens appeared to be one of "shock" that these murders had occurred in their community. There was also fear among citizens of the County that members of the community might be in danger of having similar acts committed against them, as initially no suspect or suspects in the murders were identified and it was believed that whoever committed the murders might still be in the community. It appears that much of the publicity concerning the murders centered around the initial discovery of the bodies of five of the victims, the search for the body of the sixth victim, Mary Alday, and the attempt to identify a suspect or suspects in the murders with reference to the evidence found at the scene of the crime. Once the four suspects were identified, much of the publicity centered around the search for and apprehension of the suspects in West Virginia and the return of these suspects to Georgia and their subsequent arraignment on these charges.

It is obvious that the amount of publicity substantially subsided in the interval between the arraignment of the Petitioners and their coindictees and the trial of the first of the four accused men, Carl J. Isaacs. During this interval the considerably diminished newspaper coverage concerning the crimes dealt with the progress of the legal proceedings, including the appointment of counsel for the suspects, the withdrawal of certain attorneys for certain of the defendants and the subsequent appointment of new counsel and the filing of various motions on behalf of the four defendants. The Court specifically notes in this regard that several of the reporters who covered the crimes testified that they left Seminole County after the suspects had been arraigned and did not return until the beginning of the trial of Carl Isaacs.

It clearly appears that this marked decrease in publicity resulted in an attenuated "cooling off period" during which the tension felt in the community immediately following the crimes and especially prior to the capture of the suspects decreased. This decrease in tension was similar to the decrease in community tension which was found to have existed between the first trial and second trial of the defendant in *Patton v. Yount, supra.* In this case approximately eight months elapsed between the date the crime was committed and the dates on which Petitioners were brought to trial, and in cases dealing with claims of prejudicial pretrial publicity such a time lapse has been regarded as being a matter of significance. In *Wansley v. Slayton*, 487 F.2d 90, 93-94 (4 Cir. 1973), *cert. denied* 416 U.S. 994 (1974), the court stated that "recency is a critical factor to be considered in connection with any

claim of pretrial prejudicial publicity". In the case of *Calley, supra,* the Court of Appeals took particular note of the fact that several months had elapsed between the time when the pretrial publicity occurred and the time when Calley was brought to trial and the Court stated: "Where there has been a substantial lapse of time between the publicity and the trial, there is a far lesser likelihood the publicity will affect the jurors' deliberations." This same principle was recognized in *United States, ex. rel. Rosenberg v. Mancusi,* 445 F.2d 613 (2 Cir. 1971), *cert. denied* 405 U.S. 956 (1972) (eight months between crime and trial); and in *United States v. Bowe,* 360 F.2d 1 (2 Cir. 1966), *cert. denied,* 385 U.S. 961 (adverse publicity appeared "several months" prior to trial); and *Beck v. Washington,* 369 U.S. 541 (1962) (nine and one-half months sufficient time for impact of prejudicial publicity to subside).

This finding of the decline in community feeling above referred to is not an inference made by the Court, but is supported by the evidence presented. For example, although mob or community violence was stated to be anticipated by certain members of the law enforcement community immediately after the crimes occurred and certain portions of the publicity which the Court now has before it indicate a high level of emotion in members of the community, no actual threats or violence ever materialized in Seminole County against Petitioners or any of their coindictees and, in fact, some of the newspaper articles and other forms of publicity urged community restraint and aided the subsidization of community emotion.

By way of example, the Court notes the editorial column entitled "Out on a Limb" by Bo McLeod in the

Donalsonville News, published Thursday, May 24, 1973. This article contained the following language and is considered by the Court as indicative of community sentiment in Seminole County during the relevant time period:

> Yes, the four men suspected and accused of the murder of the six Aldays can get a fair trial in Seminole County. . . . The people of this community are capable of cooperating with and respecting the various steps toward their trial. They are very angry about what happened. . . . There is a wide difference in the question of whether the people here could give the suspects a fair trial, and in our wanting to see guilty ones punished and removed from being able to commit the same outrages again, a few years from now, on other innocent people.
>
> But our people want to be sure that the suspects now being held in jail are the ones who committed the crimes. We don't want to see four innocent men punished. . . . We're innocent of bias and prejudice, until you prove us guilty. . . . Few screwballs among us who get a thrill out of talking dumb and sounding off about what all they'd like to do to the four men, . . . but they're in the extreme minority, and they are pretty well known for their lack of sense.
>
> Bud Alday spoke the sentiments of his family when he said they didn't want to see anybody else get hurt in this terrible tragedy that came our way, "enough people have been hurt already," he said. . . . The only thing that any kind of mob action, or inciting troublesome thoughts can bring is more sorrow. . . . The law must be obeyed.

The Court considers this statement on the editorial page of the local newspaper to be indicative of the sentiments of the community, i.e., that the citizens of the community certainly wanted to see the persons responsible

for the crimes punished, not that they wanted to see Isaacs and Dungee or their coindictees punished if they were not responsible.

Based on the foregoing Findings of Fact the Court concludes that the volume of publicity in and of itself has not established the requisite prejudice, as will be discussed more fully in the Conclusions of Law to be made at the end of this order. The Court will now state its Findings of Fact relative to the nature of the publicity given to the crimes.

In *Patton v. Yount, supra,* the Court noted that during the voir dire proceedings the newspaper published articles on almost a daily basis, but that the articles were "purely factual articles". Similarly, in reviewing the nature of the publicity disseminated about the crimes in this case this Court finds that most of the articles and reports were straightforward factual reports about the crucial events in the proceedings then taking place, whether that was the discovery of the five bodies, the search for the body of Mary Alday, the funeral of the victims, the identification and capture of the suspects, the return of the suspects to Georgia, the suspects' arraignment, the indictment by the grand jury, the appointment of counsel, the filing of pretrial motions, hearings on the pretrial motions, or the anticipation of the beginning of trial and the selection of potential jurors.

This Court finds as did the Court in *Patton v. Yount, supra,* that many of the newspaper accounts in the *Donalsonville News,* the *Albany Herald,* the *Bainbridge Post-Searchlight* and the *Dothan Eagle,* as well as the transcript of the broadcasts of the Georgia Network News

were announcements of trial dates and scheduling which is common in rural newspapers as to criminal matters.

None of the publicity reviewed by the Court reveals a situation such as that presented in *Rideau v. Louisiana*, 373 U.S. 723 (1963), in which the defendant confessed to several crimes committed in a parish in Louisiana, which confession was videotaped and broadcast on three occasions by a local television station. with the broadcast being seen by 24,000, 52,000 and 29,000 people within the community. *See* 373 U.S. at 724. *(See also* Remand Order of the Court of Appeals for the Eleventh Circuit, footnote 8). No statements of Isaacs or Dungee or any of their coindictees were made public by means of newspaper accounts or electronic means. Additionally, there were very few statements made by the prosecution team trying the case, except the statement that there were perhaps 50 potential witnesses to be called at the trial of the defendants, with approximately only 20 persons who would actually be called to testify, and the statement that Billy Isaacs was expected to testify for the prosecution against his coindictees. There were statements made by Petitioners' lawyers and other defense attorneys, but even these statements were brief and generally did not comment on any of the evidence which might be brought out at trial. There were very few editorials concerning the crime and most persons quoted in the newspaper did not make public comments about what punishment they believed that the persons responsible for the murders deserved.

It seems clear that the nature of the publicity provided Seminole County citizens and citizens of the southwest Georgia area with a great deal of information con-

cerning the crimes and the suspects and that this publicity, as well as word-of-mouth communication, aroused citizens' interest in the crimes, but this Court can in no way characterize the majority of the publicity, either in newspaper form or as contained in electronic media broadcasts, as having been of that brand of publicity referred to as "yellow journalism". The Court can find no "barrage of inflammatory publicity" in the record before this Court such as discussed in *Murphy v. Florida*, 421 U.S. 794, 798 (1975), as cited in *Patton v. Yount, supra.*

In *Mayola v. Alabama*, 623 F.2d 992 (5 Cir. 1980), Michael Mayola, who was convicted of the first degree murder of an eleven year old boy, contended intensive pretrial publicity and community prejudice had prevailed in Oneonta, Alabama and the surrounding county. The United States Court of Appeals for the Fifth Circuit found that the publicity in that case was "highly prejudicial" because it contained references to erroneous reports showing that the victim had been sexually assaulted and mutiliated and made recurring references to Mayola's prior convictions. The Court also found that there were "exploitative illusions to alleged sexual perversion". *Id.* at 998. A perusal of the record before this Court reveals no such misstatement of the facts surrounding the commission of the crimes or the evidence ultimately admitted in the trial of Petitioners or their coindictees. Although arguably two detective magazines found in the Donalsonville, Georgia area contained rather explicit descriptions of the crimes and the suspects, these magazines were introduced at the original hearing on the motions for change of venue and it was revealed that one of the magazines was removed from a local newsstand because the owner of the news-

stand felt the article written concerning the murders in Seminole County was "misleading". (Motion for change of venue hearing transcript, p. 7.) It has never been established that persons who may have bought this magazine were citizens of Seminole County and therefore prospective jury members.

Headlines from the *Donalsonville News* illustrate the straightforward type of news reporting generally found in the pretrial publicity submitted for examination: Thursday, May 24, 1973, "Four Are Accused of Alday Murders"; Thursday, May 31, 1973, "No Date Set for Committal Hearings for Four Accused in Alday Murders"; June 14, 1973, "New Lawyers Are Named to Four Charged with Murder"; Thursday, July 19, 1973, "Committal Hearing Time Set For Accused in Alday Case"; Thursday, September 6, 1973, "Grand Jury Returns total of 19 charges in Alday Cases"; Thursday, October 11, 1973, "Judge Geer Sets December Date for Alday Murder Trial".

Similarly, excerpts from the Georgia Network News tapes reveal the following types of information being communicated by radio or television: 8:30 a.m., Tuesday, May 15, 1973, ". . . authorities in Donalsonville, Georgia say they have found the bodies of five persons, all said to be members of one family, shot dead in a house trailer. Details of the incident are sketchy. . . .;" 3:30 p.m., Tuesday, May 15, 1973, "We have new developments at this hour in the mass murder of six members of the Alday family of Donalsonville in Southwest Georgia. Police are now looking for prison escapees from up north"; 9:30 a.m., Friday, May 18, 1973, "Police in West Virginia using dogs captured the remaining three of four suspects in connection of

the six Alday murders. . . ."; 12:30 p.m., Friday, May 18, 1973, "A sigh of relief, and then more tragedy in Donalsonville, Georgia today. The sigh comes from the ultimate capture this morning of the remaining three fugitives at large in the six Alday murders from Tuesday morning . . . the tragedy comes with the word that the mother of Mary Alday, who police say was raped, then murdered near Donalsonville, died of a heart attack earlier today . . . Sheriff White said he's had no specific threats of a lynching . . ."; 7:30 a.m., Monday, May 21, 1973, "Averett Alday found the bodies of five of the six victims last Thursday. Now he's asking Seminole Countians to keep their heads during these emotionally charged days. He says enough folks have been hurt already"; 8:30 a.m., Monday, May 21, 1973, "within the hour, the four suspects in the killings of six members of the Alday family of Seminole County take off from Atlanta for a flight to Donalsonville and a pretrial hearing in the charges they murdered the six Aldays a week ago tonight. Their bodies were discovered by another Alday, Bud, last Tuesday. And Bud Alday is now urging his neighbors in the town of twenty-five hundred to keep calm while the four suspects go through the criminal justice system. . . ."; 12:30 p.m., Monday, May 21, 1973, ". . . here are the latest developments in the Donalsonville murders . . . the four arrived and were turned over to Seminole County Sheriff Dan White and escorted into the courthouse. There was a crowd of about one hundred inside, about the same number outside. According to State Division of Investigation Director Bill Beardsley, the crowd has been quiet. [Recording] "Well, they just appear interested. They certainly are taking everything in and just paying attention to what's going on"; 2:30 p.m., Monday, May 21, 1973, "Those Four suspects in the Alday

murders in southwest Georgia have been taken before a preliminary hearing in Donalsonville. One of the four asked for a mental examination. As for the citizens of Donalsonville, apparently they're keeping their cool, in spite of the intense emotion which followed the mass murders last week. Division of Investigation Chief Bill Beardsley told us he doesn't expect any problem: [Recording] "Oh, no, no, uh-uh. These are very sophisticated people down here. We didn't anticipate anything, and I'm just sure there won't be anything"; 4:30 p.m., Wednesday, August 8, 1973, "Committal hearings were scheduled today in Donalsonville, Georgia for three of the four defendants in the Alday murder case. The three are charged with the murders of six members of a south Georgia farm family earlier this year. Today's hearings were behind closed doors and under tight security."

By selecting the above quoted excerpts from the *Donalsonville News* and from the Georgia Network News tapes, the Court does not intend to place undue emphasis on either of the two sources or to imply that only the selected references were reviewed by the Court, but the selection does indicate types of materials that were contained in those two sources, as well as in some of the previously mentioned sources.

In short, this Court finds as fact that a majority of the news reports with reference to these crimes were straightforward, factual and non-inflammatory, and that a great deal of the publicity revealed that community tension which was initially high, subsided and, as will be discussed, culminated in the trials of the three persons ultimately tried for murder in a "controlled" courtroom atmosphere.

While Isaacs and Dungee have not specifically alleged that there was a "carnival atmosphere" in the courtroom as found to exist in such cases as *Estes v. Texas,* 381 U.S. 532 (1965), and *Sheppard v. Maxwell,* 384 U.S. 333 (1966), the Court deems the atmosphere in the courtroom during the trials to be important in determining the impact of any publicity on the community so as to determine if Petitioners were denied their right to a fundamentally fair trial. All of the evidence shows that citizens of Seminole County who were prospective jurors were barred from the court proceedings and that tape recorders, cameras and other electronic equipment was banned from the courtroom. Additionally, presiding Judge Geer limited the press to a specific area of the courtroom and allowed limited ingress and egress. Judge Geer was not required to quell any emotional outbursts from the Alday family members or spectators in the courtroom during the trials. By way of example, Reporter William Montgomery of the *Atlanta Journal* testified that there was no "weeping or wailing" in the courtroom, that there were no shouts of grief from the audience and that generally the courtroom atmosphere was such that it was not necessary for the judge to demand order in the courtroom. Similar testimony was given by Mr. Bill Cotterill of the United Press International, as well as other persons testifying who were present in the courtroom during the trial.

There are many other observations which this Court could make about the amount of publicity and its nature, but to comment specifically on all evidence before the Court is unnecessary and would serve little purpose at this juncture. The Court simply repeats that it does not find that the pretrial publicity given to the trials of those charged with the Alday murders was sufficiently "preju-

dicial", "inflammatory", or "impassioned" as to amount to a denial of fundamental fairness or that the setting of the trial was inherently prejudicial as a matter of fact so as to render the trials fundamentally unfair.

Having made these Findings of Fact, and having previously noted the law to be applied in this case, the Court reiterates that the principle of "presumptive prejudice", as the United States Court of Appeals for the Fifth Circuit noted, is only "rarely applicable". *Mayola v. State of Alabama, supra,* at 997, *quoting Nebraska Press Association v. Stuart,* 427 U.S. 539, 544 (1976). Further, the Court in *Mayola* stated that a petitioner must demonstrate an extreme situation of inflammatory pretrial publicity that saturates the community in which the trial is conducted and declined to apply the presumptive prejudice standard of *Rideau v. Louisiana, supra.*

Having reviewed the landmark cases in the area of alleged prejudicial pretrial publicity, in light of the recent decision of the United States Supreme Court in *Patton v. Yount, supra,* this Court simply finds that Petitioners have failed to carry their burden of establishing "essential unfairness", as the result of alleged prejudicial pretrial publicity. Petitioners have established neither actual nor presumptive prejudice due to the volume or nature of the pretrial publicity, considered in the context of the nature of the community, the nature of the victims, the nature of the defendants and all other relevant factors.

Succinctly stated, this Court concludes that Isaacs and Dungee were not convicted because of pretrial publicity. They were convicted and received the sentences imposed because of the overwhelming uncontradicted evidence of their wilful participation in what is generally regarded as

the most heinous criminal orgy in the history of the state. Therefore, the Court denies Petitioners federal habeas corpus relief based on their allegation of prejudicial pretrial publicity.

CONCLUSION

WHEREFORE, in accordance with the remand Order of the United States Court of Appeals for the Eleventh Circuit as supplemented by later orders, this Court now certifies these Findings of Fact and Conclusions of Law to the Court of Appeals for its consideration and the disposition of Petitioners' appeal.

This 18th day of March, 1985.

/s/ J. Robert Elliott
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8017

CARL J. ISAACS and GEORGE ELDER DUNGEE,

Petitioners-Apellants,

v.

RALPH KEMP, Warden, Georgia State Prison,

Respondent-Appellee.

No. 85-8202

GEORGE ELDER DUNGEE,

Petitioner-Appellant,

v.

RALPH KEMP, Warden, Georgia State Prison,

Respondent-Appellee.

No. 85-8277

CARL J. ISAACS,

Petitioner-Appellant,

v.

RALPH KEMP, Warden, Georgia State Prison,

Respondent-Appellee.

Appeals from the United States District Court
for the Middle District of Georgia

(December 9, 1985)

Before JOHNSON and ANDERSON, Circuit Judges, and HUNTER*, District Judge.

ANDERSON, Circuit Judge:

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* Hon. Edwin F. Hunter, Jr., U.S. District Judge for the Western District of Louisiana, sitting by designation.

Petitioners Carl J. Isaacs and George Elder Dungee appeal from the federal district court's denial of their habeas corpus petitions.[1] On May 14, 1973, five members of the Alday family were shot to death in their mobile home in Donalsonville, Georgia. A sixth person, Mary Alday, was taken from the mobile home, raped, and then shot to death.[2] On September 4, 1973, Seminole County's grand jury indicted Carl Isaacs, Dungee, Billy Isaacs, and Wayne Carl Coleman on six counts of murder. Some three months later, Billy Isaacs, Carl's sixteen-year old brother, pleaded guilty to armed robbery and burglary. He was sentenced to a forty-year prison term. Shortly thereafter, the three remaining defendants were tried separately, convicted, and sentenced to death by electrocution. Several post-conviction proceedings followed.[3] Petitioners have exhausted their state remedies.

In this habeas proceeding, petitioners raise five issues: (1) whether pretrial publicity and the community's atmosphere were so prejudicial and inflammatory that the trial court's refusal to grant appellants' motion for a change of venue deprived them of their Fourteenth Amendment due process rights; (2) whether, under the Fourteenth Amendment's due process clause, appellants received sufficient notice specifying the aggravating circumstances which the prosecutor would rely on in the sentencing phase of the bifurcated trial; (3) whether the trial court's jury instruction on intent impermissibly shifted the burden of proof from the state to the petitioners in violation of the Fourteenth Amendment's due process clause; (4) whether Georgia's death penalty is applied in a discriminatory manner, thus violating the dictates of *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam); and (5)

whether the district court erred in refusing to allow appellants leave to amend their petition to add claims which are, in large part, already before the court in a related case.[4] We have carefully reviewed the entire record available for our consideration, and we conclude that the district court's order denying habeas relief should be reversed on the basis of the first issue raised by the petitioners.[5]

This court has considered the presumed prejudice issue at length in the companion case of *Coleman v. Zant*, No. 82-8310, published simultaneously with this opinion. In *Coleman*, we concluded that highly prejudicial publicity had saturated and inflamed the community to the extent there was overwhelming prejudice in Seminole County both as to petitioner Coleman's guilt and the sentence he should receive. Accordingly, we presumed prejudice under *Rideau v. Louisiana*, 373 U.S. 723 (1963). While the legal standards and relevant facts are basically the same, there are some differences between Coleman's case and the cases of Isaacs and Dungee.

We must determine whether differences between the cases of Isaacs and Dungee, on the one hand, and Coleman's case on the other hand, suggest that prejudice should be presumed for Coleman, but not for Isaacs and Dungee. Upon review, we conclude that while there are differences between the cases, these differences are not of sufficient significance to warrant a different result in Isaacs' and Dungee's cases.

The primary difference between Coleman's case and that of petitioner Isaacs is that the verdict and sentence in the previous cases as well as the explicit details of Billy Isaacs' testimony were not published prior to Carl Isaacs'

EDITOR'S NOTE

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CLERK

No. 85-1652

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Petitioner,

vs.

WAYNE CARL COLEMAN,
CARL J. ISAACS, AND
GEORGE ELDER DUNGEE

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT GEORGE ELDER DUNGEE

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QUESTION PRESENTED

Whether this Court should grant review on writ of certiorari when the questions posed by the petitioner were not argued in the court below and are not presented by the decision in this case?

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IN THE

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GEORGE ELDER DUNGEE

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT GEORGE ELDER DUNGEE

George Elder Dungee, in response to the Petition for a Writ of Certiorari herein, urges this Court to deny the writ because the questions asserted in the petition are not properly presented in this case.

STATEMENT OF THE CASE

George Elder Dungee was tried and sentenced to death in a small, close-knit, rural Georgia community of just over 2,000 households for the murders of six of its most prominent and respected citizens. From the moment that word of the tragedy reached those living in the community until the start of George Dungee's trial, the entire community became a part of events, discussions, and media coverage unprecedented in Georgia history and in the history of most communities, regardless of size, in this land.

Mr. Dungee was tried by a jury chosen from that community, which had been intimately involved in the response to the loss of

its six citizens and had reached a consensus about guilt and punishment not only before his trial, but before his arrest. One of the jurors who decided Mr. Dungee's fate testified in the District Court below that because of intense interest and widespread knowledge in the community, "everyone" in the community knew that Mr. Dungee and the others accused were guilty and should be "fr[ied]" before trial ever started. Transcript, Nov. 5, 1984 hearing before District Court below, at 187-188, 197.

Seminole County's ranking law enforcement officer, the popularly elected sheriff, was quoted as saying "[t]here's not a doubt in my mind that lynching has crossed the mind of everybody." Coleman v. Kemp, 778 F.2d 1487, 1520, 1527, 1530 (11th Cir. 1985); Appendix to Petition for a Writ of Certiorari [hereinafter "App."] at 149, 167, 172.[1] The sheriff was also quoted extensively in newspapers and magazines read in Seminole County expressing the sentiment:

> If I had my way about it, I'd have me a large oven and I'd precook them for several days, just keep them alive and let them punish. . . . And I don't think that would satisfy me.

778 F.2d at 1501, 1518, 1528, App. at 106, 146, 167, 169.

Another elected official, State Senator Julian Webb, successfully avoided appointment as attorney for any of those accused in the killings, saying "I absolutely cannot in good conscience, both personally and professionally, defend any of the accused." 778 F.2d at 1495, App. at 92.

All eight attorneys initially appointed to defend Mr. Dungee and the others accused of the crimes publicly voiced their opposition to their appointments and indicated they would be seeking

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1. The the Court of Appeals for the Eleventh Circuit summarizes the extensive media coverage as well as word-of-mouth communication which saturated the small rural community in Coleman v. Kemp, 778 F.2d at 1491-1537, App. 83-187. Coleman was published simultaneously with the opinion in this case.

to be removed from the case.[2] Many were vehement. The attorneys were reported as expressing the opinion that the appointment was the "worst thing that ever happened to me professionally", that they would be faced with "a loss of money and friends", and that they would "rather take a whipping" than defend those accused. 778 F.2d at 1504, App. 112, 113. One attorney summarized community sentiment:

> I feel the feeling in Seminole County and this part of Georgia is such that I don't want it. It's not the kind of case I want to get involved in. Right now, I plan to ask to be relieved.

778 F.2d at 1516, App. 141.

It was reported that "none of the eight lawyers named want the job," but they were defending those accused only because "the judge must appoint defenders for the accused, and there are stiff and severe penalties for attorneys who refuse." 778 F.2d at 1494, App. 90. One attorney was quoted as saying, "I've done everything I can to get out of it. It's worse than a dose of Colomel [a laxative] but I have to take it. To refuse would be contempt of court." 778 F.2d at 1522, App. 155 [emphasis added].[3]

As observed by the Court of Appeals, the many public attempts of the lawyers to avoid appointment to the case both "reflect[ed] their assessment of the community atmosphere and

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2. A sampling of the articles in the record demonstrates the public nature of the efforts of counsel to avoid appointment of this case. See, e.g., "Judge Names Attorneys for Alday Suspects, Nobody Wants Job", Albany Herald, May 25, 1973; "Blakely Lawyer Also Protests Alday Slayings Defense Role", Albany Herald, May 26, 1973; "Donalsonville Lawyer Believes Judge Will Uphold His Excuse", Albany Herald, May 29, 1973; "Webb Appointed But Desires Off", Dothan Eagle, May 25, 1973; "Alday Slay Suspect Lawyers Want Out," Atlanta Journal, May 25, 1973.

3. The lawyers who defended George Dungee made it clear to the jury that they were appointed to defend him. In his only reference to Mr. Dungee during closing argument at the sentencing phase, the lawyer said: "You have got a little ole nigger man over here that doesn't weigh over 135 pounds. He is poor and he is broke. He's got an appointed lawyer . . . . He is ignorant. I will venture to say he has an IQ of not over 80." Transcript of Opening and Closing Arguments at 39.

aggravat[ed] same." 778 F.2d at 1539, App. 190.

In contrast to the unwillingness of any lawyer in the community to defend the accused, the surviving members of the Alday family retained a prominent, popular political leader, former Lt. Governor of Georgia Peter Zack Geer, the nephew of the trial judge, W. I. Geer, to prosecute the case before his uncle. Another prominent lawyer, Alto Lee, volunteered his services and assisted former Lt. Governor Geer in prosecuting the case.

The community's prejudgment of guilt and punishment was reinforced by the highly publicized trial and sentence of death of Mr. Dungee's co-indictee, Carl J. Isaacs, only days before Mr. Dungee's trial. At least one of Mr. Dungee's jurors, Thelma Butler Harrington, attended the trial of Carl Isaacs. Tr. Nov. 5, 1984 hearing at 190-195. Mrs. Harrington testified that the verdict in the Isaacs case was transmitted throughout the community "like chaff in the wind." Id. at 195. "Radio, television, mouth-to-mouth and friend-to-friend. Everybody was talking about it." Id. It was "widely reported that [the Alday] family members were pleased with the death sentenced returned in Carl Isaacs' case." 778 F.2d at 1539, App. 191.

Mrs. Harrington also testified in the District Court below that everyone in the community had decided that the accused were guilty and wanted the death penalty before trial:

> Q. What did [people] say?
>
> A. Fry 'em, electrocute 'em
>
> Q. What else?
>
> A. That's about all I heard, that what's should be done for 'em.
>
> Q. But that was the community sentiment, fry 'em or electrocute 'em?
>
> A. Everybody felt that, yes.
>
> Q. Everybody?
>
> A. Yes.

Tr. Nov. 5, 1984, at 187-188. This same juror was later examined

by counsel for the State as follows:

> Q. Ms. Harrington, isn't it true that members of the Seminole County and Donalsonville area that you talked to said that the defendants should be electrocuted or fried, as you said, if they were the ones that had committed the crimes?
>
> A. Everybody had that sentiment, I think.
>
> Q. Isn't that with the ones that had committed it though, Ms. Harrington?
>
> A. Yes.
>
> Q. They should not be punished if they had not done the crime though, should they?
>
> A. Well, everybody knew they did it though.

Id. at 197 [emphasis added].

Nevertheless, the trial judge, the uncle of the special prosecutor hired by the family to prosecute the accused and obtain the death penalty, refused to grant a change of venue.

The Court of Appeals below found from its painstaking examination of the totality of the circumstances that "highly prejudicial publicity had saturated and inflamed the community to the extent there was overwhelming prejudice in Seminole County" with regard to both guilt and sentence. Isaacs & Dungee v. Kemp, 778 F.2d 1482, 1484 (11th Cir. 1985), App. at 265. It also found that juror Harrington's attendance at the trial of Carl Isaacs the week before sitting as a juror on George Dungee's trial was "an additional factor in Dungee's case which provides significant support" for a finding of prejudice. 778 F.2d at 1484, App. at 266. Finding that the failure of the trial court to grant a change of venue was manifest error, it ordered habeas corpus relief.

REASONS FOR DENYING THE WRIT

This case does not present any issue worthy of review by this Court. The questions presented by petitioner were not argued in the court below and are not present in this case. Moreover, they are not worthy of review. For the reasons which follow, this case should not be reviewed by this Court.

I. NO CONTENTION REGARDING ANY "PRESUMPTION OF CORRECTNESS" WAS MADE BY THE STATE IN THE COURT BELOW.

The first question asserted by the State in its Petition in this case -- whether the presumption of correctness set out in 28 U.S.C. § 2254(d) affects this Court's decision in Rideau v. Louisiana, 373 U.S. 726 (1963) -- was not presented to or decided by the Court of Appeals below and, therefore, should not be considered by this Court.

In its brief to the Court of Appeals for the Eleventh Circuit, the State asserted that the issue presented by this case was a mixed question of law and fact. Supplemental Brief on Behalf of the Respondent-Appellee [Warden Kemp] By the Attorney General in 11th Cir. No. 85-8202 at 19.[4] In the entire discussion of the venue issue on pages 23-65 of its original brief and pages of 21-66 of its supplemental brief after the remand, the State never asserted that any presumption of correctness attached. The Court of Appeals observed that the State had asserted that the issue was a "mixed question", but found it unnecessary to decide whether the State had waived any argument that the issue was one of "pure fact" which might be entitled to some presumption in light of its application of the "manifest error" standard in deciding the case. Coleman, 778 F.2d at 1538 n. 19; App. at 201, n. 19.

This Court should not decide an issue not urged and briefed

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4. As will be discussed in Section II, this was a correct statement of the standard of review. Any findings made by the state courts would not be entitled to a presumption of correctness because of the inadequacy of the state court fact hearings. 28 U.S.C. 2254(d)(3)(6)(7).

by the State below. United States v. Ortiz, 422 U.S. 891, 898 (1975) (where examination of government's brief indicates it did not raise issue, but asserted contrary position in court of appeals below, Court declines to consider question); see also Adickes v. Kress & Co., 398 U.S. 144, 147 n. 2 (1970); California v. Taylor, 353 U.S. 553, 557 n. 2 (1957).

II. BECAUSE OF THE INADEQUACY OF THE STATE COURT FACTFINDING, NO PRESUMPTION OF CORRECTNESS ATTACHED.

The Court of Appeals had previously determined that material facts were not adequately developed in the state courts and remanded the cases involving Mr. Dungee and his coindictees for further development of the record. Coleman v. Zant, 708 F.2d 541, 545-549 (11th Cir. 1983); Isaacs (& Dungee) v. Zant, 709 F.2d 634 (11th Cir. 1983). The Court found that facts "crucial in determining the degree to which the publicity was prejudicial and the saturation thereof" had not been developed. 708 F.2d at 547.

The remand to the District Court confirmed the inadequacy of the state court factfinding and the need for a fully developed record on pretrial publicity and community attitudes. Documentary evidence and the testimony of witnesses presented on remand established the full extent of the media coverage, later summarized in the Coleman opinion, 778 F.2d at 1491-1537, App. 83-187, and the community prejudgment of the case.

For example, because of the inadequacy of the brief, group voir dire,[5] during which only conclusory questions were asked,

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5. Jury selection in Mr. Dungee's case took less than a day and covers only 165 pages of transcript. Trial Tr. at 58-223. Only forty venirepersons were questioned. Only 24 of those were even asked if they knew or had heard anything about the case. Trial Tr. 58-223. The incredibly superficial voir dire here contrasts sharply with voir dire in other cases considered by this Court. In Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984), which involved a retrial four years after the crime, ten days of individual sequestered voir dire, were needed covering 1,196 pages of transcript, to select fourteen jurors from 167 venirepersons 81 L.Ed.2d at 851, 856 n. 10. In Irving v. Dowd, 366 U.S. 717 (1961), it took eight days to select fourteen jurors from 430 venirepersons. Patton, 81 L.Ed.2d at 856 n. 10.

the state courts knew nothing about what jurors knew about the case or opinions they had formed.[6] Mrs. Thelma Butler Harrington, who was selected as a juror in the case, and many of the other prospective jurors were never asked what they had seen, heard, read or knew about the case. See Trial Tr. at 175-177. However, as established by her testimony in the District Court below, Mrs. Harrington was thoroughly familiar with the case through word-of-mouth communication and pretrial publicity, had attended the trial of Carl J. Isaacs days before sitting as a juror at Mr. Dungee's, and knew, like "everyone" in the community, that Mr. Dungee was guilty and should be "fr[ied]" before trial ever started. Tr. Nov. 5, 1984 at 187-188, 197.

Thus, any factual findings which may be implied -- no explicit findings were made -- are not entitled to a presumption of correctness by the express terms of 28 U.S.C. § 2254(d) because "material facts were not adequately developed", (d)(3), Mr. Dungee did not receive "a full, fair and adequate hearing", (d)(6), and he was denied "due process of law", (d)(7), by the appointment of unwilling counsel, who referred to him as a little "136-pound nigger man" in closing argument, and by the prosecution of this case by the nephew of the trial judge. Thus, this case does not present any collision between the presumption set forth in 28 U.S.C. § 2254(d) and a determination that pretrial publicity has created an inherently prejudicial atmosphere as in Rideau v. Louisiana, 373 U.S. 726 (1963), as conceived in the State's petition.[7]

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6. The petition for certiorari asserts the Court of Appeals gave "no consideration . . . to the voir dire proceedings . . ." or "totally disregarded the jurors' statements . . . ." Petition at 16. This is simply untrue. The Court considered the voir dire, including its limited value to to its inadequacy. 778 F.2d at 1541-1543, App. at 194-198. As pointed out in note 5, in many instances there was no statement for the Court to consider because the jurors were never asked the critical questions. the presumption of correctness set forth in 28 U.S.C. § 2254(d)

7. The State's argument is flawed in another sense as well. Rideau does not employ a "presumption" in terms of allocating the burden of proof or the weight to be given certain evidence or

[footnote continued on next page]

III. BECAUSE THE COURT OF APPEALS FOUND MANIFEST ERROR AND THAT ANY FINDINGS WERE NOT SUPPORTED BY THE RECORD, THE ISSUE RAISED BY THE STATE IS NOT PRESENTED IN THIS CASE.

Even were the presumption of correctness a factor in this case, it would not change the outcome in light of the "extremely high standard of review" employed by the Court of Appeals in deciding this case. Coleman, 778 F.2d at 1538, App. at 188. The Court of Appeals concluded that "applying the relevant legal standards, be it 'manifest error,' 'fairly supported by the record,' 'clearly erroneous', or independent review of a mixed question of fact and law" the unprecedented evidence established the denial of a fair trial before an impartial jury. 778 F.2d at 1537, App. 188.

Thus, even if there was a presumption of correctness in this case, it would be overcome by the "convincing evidence" presented in the District Court, 28 U.S.C. § 2254 (d), and, if not, would not survive the "fairly supported by the record" and "manifest error" standards applied by the Court. Id.; Patton v. Yount, 467 U.S. 1025, ___, 104 S.Ct. 2885, 2889 n.7, 81 L.Ed.2d 847, 854 n.7 (1984).

[continued from previous page:]

findings. Indeed, Rideau never uses the word "presumption." Instead, the Court found publicity so prejudicial and so pervasive that refusal to change venue was a denial of due process. Because the impact of the publicity rendered the subsequent trial a "hollow formality", this Court found, without review of the voir dire, that the defendant was entitled to a jury drawn from another community. 373 U.S. at 726-728. Similarly, here, as acknowledged in juror Harrington's testimony, everyone in the community knew the suspects were guilty and should be sentenced to death. In this situation, an accused has the right to a jury drawn from another community without the intense, emotional involvement persons in Seminole County had about this case. Because this was the right recognized here, and the denial of that right is supported by an examination of the voir dire and the testimony of jurors, the State's collision between presumptions is largely imaginary.

IV. BECAUSE THE COURT OF APPEALS CONSIDERED THE TOTALITY OF THE CIRCUMSTANCES, INCLUDING ALL OF THE FACTORS ASSERTED BY THE STATE, THERE IS NO ISSUE AS TO WHAT CONSTITUTES THE TOTALITY OF THE CIRCUMSTANCES.

Although the Court of Appeals below expressly stated that it reviewed the "totality of the circumstances", the State asserts before this Court that it did not, contending the Court "ignored" the "true totality" or made a "superficial review of the totality of the circumstances." Petition at 18-20. It asks this Court to grant certiorari to decide what constitutes the "true totality." No issue is presented by this contention.

Each factor asserted by the State as part of the totality of the circumstances in its brief to the Court of Appeals was considered at some length by that Court. Supplemental Brief in 11th Cir. No. 85-8202 at 27-28, 37, 52-62; 778 F.2d at 1491-1537, 1540-1543, App. 83-187, 193-197.[8] It asserts those same factors again in its Petition to this Court. Petition at 19. The State has pointed to nothing that was left out of the totality; it is simply dissatisfied with the legal conclusion reached by the Court of Appeals. Thus, it presents no question worthy of review by this Court.

---

8. One factor which clearly was not considered by the Court of Appeals was the "small town syndrome", which the State conjures up and then charges the Court with utilizing to assume "that small, rural communities have preconceived notions as to guilt or innocence and/or sentence in widely publicized murder cases . . . ." Petition at 20. No such "syndrome" is ever mentioned by the Court of Appeals, nor is any such assumption ever made in its opinion. The Court discusses at length the particular facts presented by this case, which happens to involve a small community. At no point in this litigation has it been suggested that another small community would react the same way. Only the State has suggested that there is some "syndrome" regarding all small towns.

CONCLUSION

For the foregoing reasons, this Court should deny Warden Kemp's request to grant the writ.

Respectfully submitted,

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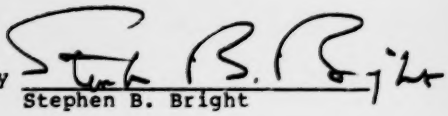
By 
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Respondent George Elder Dungee was served upon counsel of record for Petitioner, Susan V. Boleyn, Assistant Attorney General, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA, 30334, by mailing a copy of each to her, at the foregoing address, by first class United States Mail, this 6th day of May, 1986.

Stephen B. Bright

EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-1652

RALPH KEMP, Warden,

Petitioner,

v.

WAYNE CARL COLEMAN,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether under the remarkable facts of this case, certiorari must be granted to review the Eleventh Circuit's decision granting Respondent a new trial, even though the overwhelming evidence in the record demonstrates that, in this capital case, Respondent had no chance of receiving a fair trial in a fair tribunal, due to the extensive and prejudicial publicity, which saturated the rural county of approximately seven thousand persons and predisposed the community to believe not only that Respondent was guilty but much more significantly that the death penatly was the only acceptable sentence.

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Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Respondent, Wayne Carl Coleman, responds to the Attorney General of Georgia's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. Respondent maintains that the Court of Appeals reached the only result compatible with the Fourteenth Amendment's requirement that any criminal trial be fundamentally fair, In Re Murchison, 349 U.S. 133 (1955), and the Eighth Amendment's concern that any sentence of death "be, and appear to be, based on reason rather than caprice." Gardner v. Florida, 430 U.S. 349 (1977). In short, Respondent contends that in order for this Court to reach a result, contrary to that reached by the Eleventh Circuit, this Court will have to determine that a habeas corpus petitioner is, under no circumstances, entitled to federal habeas corpus relief due to a failure of the state trial court to grant a change of venue.

STATEMENT OF THE CASE

A. Procedural History

Respondent was convicted of six counts of murder and sentenced to death in January of 1974. His convictions and sentences of death were affirmed by the Georgia Supreme Court; this Court denied certiorari. Coleman v. State, 237 Ga. 84, 226 S.E.2d 911 (1976) (Hill, J. dissenting on the basis of pre-trial publicity), cert. denied, 431 U.S. 909 (1977), rhng. denied, 431 U.S. 961 (1977).

Respondent thereafter filed a state habeas corpus petition which was denied. The State Supreme Court denied the certificate of probable cause to appeal; this Court denied certiorari. Coleman v. Balkcom, 451 U.S. 949, rhng. denied, 452 U.S. 955 (1981). Thereafter, Respondent filed a federal habeas corpus petition in the United States District Court for the Middle District of Georgia. The Honorable J. Robert Elliott denied relief after the submission of briefs by both parties. A certificate of probable cause to appeal was granted. The United States Court of Appeals for the Eleventh Circuit remanded the case to the district court for an evidentiary hearing on the issue, inter alia, of the denial of Respondent's motion for a change of venue due to the extensive pre-trial publicity. Coleman v. Zant, 708 F.2d 541 (11th Cir. 1983). After extensive evidentiary hearings, Judge Elliott again denied relief.[1] On appeal, the Eleventh Circuit remanded the case to the district court with instructions to issue the writ of habeas corpus conditioned upon the state's right to retry Respondent. Coleman v. Kemp, 778 F.2d 1487 (1985). Rehearing and rehearing en banc was denied. Coleman v. Kemp, 782 F.2d 896 (11th Cir. 1986).

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1. The evidentiary hearing held in the district court was conducted at two different times: August 7 and November 5-8 (hereinafter Aug. Evid. Hrng. and Nov. Evid. Hrng).

B. Statement of Material Facts

The Eleventh Circuit painstakingly set forth the relevant facts mandating a finding that Respondent was denied his basic constitutional right to a fair trial by the trial court's failure to grant a change of venue. The truism, "the facts speak for themselves", has seldom been as appropriate as it is in this case. The Respondent cannot adequately summarize those facts (set out in 45 pages in the Court of Appeals opinion) in this pleading and would refer this Court to the panel's opinion. Among other relevant facts, the following facts are uncontroverted:

Respondent was indicted for the murders which ultimately led to his conviction and sentence of death along with three other persons. One of the co-indictees, Billy Isaacs, testified for the State in exchange for a favorable plea bargain. The other two co-indictees, Carl Isaacs and George Dungee, were tried, convicted and sentenced to death in separate trials which began on January 1, 1974, and January 7, 1974, respectively. Respondent Coleman's trial was the last of the three trials, beginning on January 14, 1974.

All three trials were conducted in Seminole County. The Isaacs and Dungee trials were concluded, and the verdicts of guilt and the death sentences imposed at each trial were widely publicized, prior to the jury selection in Wayne Carl Coleman's trial.

At the time of Respondent's trial, Seminole County was (and is) a small rural county in Southwest Georgia with a population of approximately 7,000 persons and 2,100 households.[2] The only town of any significant size in the county is Donalsonville, with a population of 2,500. Agriculture is the main industry. (T. Nov. Evid. Hrng. at 288-89). There is very little migration into Seminole County. During the 1950's, there was a large migration of young persons out of Seminole County, leaving an older population, largely local in orientation. Consequently, most residents of Seminole County have been there most or all of their lives. (Id. at 291-95). As a result of

2. The 1970 census indicated the county's population was 7,059 and that there were 2,117 households.

Seminole County's small, rural, self-contained nature, with only a single town of any significant size, its population is closely bound by ties of kinship and friendship, attending the same churches and schools, shopping in the same place, etc. (T. Nov. Evid. Hrng. at 296). It is also an area extremely unaccustomed to homicides; with the exception of the murders which resulted in Respondent's convictions and sentences of death, there were only thirteen unlawful homicides in the ten year period from 1968-1978. (T. Nov. Hrng. at 264-66).

Among the media to which residents of Seminole County had access were the Donalsonville News (the weekly local newspaper), the Albany Herald, the Dothan Eagle, the Bainbridge Post Searchlight, the Atlanta Constitution and the Atlanta Journal,[3] the Georgia Network News on radio, television stations from Tallahassee, Florida, Dothan, Alabama and Albany, Georgia and radio stations from Donalsonville, Albany, Dothan and Bainbridge. Contained in the Record in this case are the relevant articles from the print media and the transcript of the Georgia Network News radio broadcasts.

Due primarily to the passage of time, transcripts of the other radio and television broadcasts were not available; however, the media representatives who testified at the federal evidentiary hearing noted that the radio and television coverage was as extensive as the print media coverage. Thelma Harrington and Watson Lee, both life long residents of Seminole County, recalled extensive electronic media coverage. Also, the materials that the Associated Press and United Press International send out to their subscribing newspapers (such as the Atlanta Journal) is also sent out to their electronic subscribers, both radio and television. The AP and UPI stories are broadcast in a shortened, although substantively similar form, as that which appears in the print media. (T. Nov. Evid. Hrng. at 404-05; 503-06).

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3. In 1973-74, the circulation of the Donalsonville News in Seminole County was 1,800, the Albany Herald was 518, the Dothan Eagle, 315, the Atlanta Journal was 106 and the Atlanta Constitution was 178. The circulation of the Sunday Atlanta Journal and Constitution, in Seminole County was 563. (T. Nov. Evid. Hrng. at 409).

Simply stated, the killing of the six members of the Alday family, one of the (if not the) most prominent and respected family in Seminole County, was the most significant event in the history of Seminole County. At the evidentiary hearing, journalists who covered the event surrounding the Aldays' deaths and the trial of Respondent and his co-indictees, as well as long time residents of Seminole County testified concerning the impact of these events on Seminole County.

On the day that the Aldays were killed, news of the incident spread through the Seminole County community even before it was reported by any media. (T. Nov. Evid. Hrng. at 477). When members of the media arrived at the scene of the victims' home, a crowd of between 100-200 non-law enforcement persons had already gathered. (Id. at 507-09). News of the discovery of the bodies, the search for Mary Alday, and the search for and arrest of the suspects was widely publicized in all of the media -- newspapers, radio and television. (T. Nov. Evid. Hrng. at 178, 181-183, 199-200).

The Alday's funeral was attended by a huge crowd estimated by the press to be in excess of 2,000 persons, almost one-third of the county's population, and was attended by many state and local dignitaries, including Lillian Carter, the mother of then Governor Jimmy Carter. (T. Aug. Hrng. at 46, Nov. Hrng. at 222-23). Most stores in Donalsonville, at the request of the town's mayor, closed on the day of the funeral. (T. Aug. Hrng. at 51). Additionally, Father's day in Seminole County was declared "Alday Memorial Day". All churches in the county took up a collection that day for the "Alday Memorial Fund" to be used for a new sanctuary for the Spring Creek Baptist Church.

After the arrest of Respondent and the co-indictees, the allegations were widely reported in the community that Respondent was a prison escapee from Maryland and that he was a suspect in several other crimes in other states. (T. Nov. Hrng. at 530-31). None of these widely reported allegations were ever introduced as evidence at his trial.

Equally, if not more significant than the media coverage, was the word of mouth dissemination of all information (and all rumors) throughout this small county. In the words of Thelma Harrington, a lifetime resident of Seminole county and a juror at the Dungee trial, word of news about the Alday case "spread like fire in broom sage" in Seminole County. (T. Nov. Hrng. at 176). In her words, people in the community would "have had lockjaw not to [talk]" of the incident; everyone was "so excited and upset". (Id. at 186). According to long time residents of Seminole County, this was the biggest event ever in the county. (Id. at 181, 201, 482).

People in Seminole County were willing to freely express their opinions on the case to members of the media. The only opinion heard was that Respondent and his co-indictees were guilty, and more importantly, that the only possible punishment for whomever was guilty was death. No contrary opinion was heard. (T. Nov. Hrng. 513-16, 479, 485-86, T. Aug. Hrng. at 46-47). As eloquently expressed by lifetime Seminole County resident Thelma Harrington, who sat on the Dungee jury, the unanimous sentiment of the community, pre-trial, concerning Respondent and his co-indictees was: "fry 'em, electrocute 'em", "that's all I heard", "everybody knew they did it [committed the murders]". (T. Nov. Hrng. at 187, 197). Citizens in the community were heard to express the opinion that it was too bad that there even had to be a trial before the execution could take place. (T. Nov. Hrng. at 515). It was even jokingly suggested that the suspects be released on bond in order that the execution could be accomplished outside of the formal legal process. (Id. at 516).

Shortly after the arrest of Respondent and his co-indictees, Bud Alday, a family member of the victims, privately retained Peter Zack Geer to prosecute the case. Mr. Geer, a former Lieutenant Governor of Georgia from the southwestern section of the State,[5] and had previously represented the

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5. He carried both Southwestern Georgia generally, and Seminole County specifically, in his two previous races for statewide office. (Id. at 72).

Aldays in a civil matter. (T. Nov. Hrng. at 73). Geer was paid a fee in the range of $5,000.00 to prosecute Respondent and his co-indictees. (Id. at 74).

This privately employed prosecutor, Peter Zack Geer, was the nephew of the trial judge, Walter I. Geer. (T. Nov. Hrg. 975-76). At the time he was retained by the Alday family to prosecute the case, Peter Zack Geer knew, as did the Alday family, that his uncle would be the judge.[6] (Id. at 82). The Alday family also retained a second private attorney, a good friend of the Alday family, Alto Lee, to assist in the prosecution. (Id. at 51, 56).

The prosecution of Respondent, Wayne Carl Coleman, was conducted from start to finish by the private prosecutor, the nephew of the trial judge, Peter Zack Geer. He "called the case", conducted the Preliminary Hearing, (Id. at 95), and argued the State's opposition to the motion for change of venue. At trial, Geer conducted the State's individual questioning of the jurors on voir dire examination and he exercised the State's peremptory challenges. He made the State's opening statement, examined the State's key witness, Billy Isaacs, and all other state witnesses, save one, and made the closing argument on the guilt/innocence and the closing argument at the penalty phase.

Furthermore, the plea bargain involving Billy Isaacs was arranged by Geer. The members of the media perceived him to be in charge of the prosecution and went to him for any comments from the State. (T. Nov. Hrng. at 523; Aug. Hrng. at 74-75). Whenever defense counsel needed to confer with counsel for the State, they would confer with either Geer or the other privately retained prosecutor, Alto Lee. (T. Farrington Dep. at

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6. Judge Geer refused to recuse himself even though Georgia law requires that a judge not sit in a case in which he is related to any party in interest within the sixth degree of consanguinity. Ga. Code Ann. 24-102; see also, Ga. Code of Judicial Conduct, Canon 3, C(1)(d)(ii), 231 Ga. A-5, A-6. The Judge's refusal to step down was also widely reported in the media, see e.g., Albany Herald article from September 27 titled, "Judge Won't Step Down in Alday Stayings Trial". This Court recently held that a judge's refusal to recuse himself was an error of constitutional magnitude. Aetna Life Insurance Co. v. Lavoie, ___ U.S. ___, 54 U.S.L.W. 4381 (April 22, 1986).

33-34). The District Attorney, Mr. Ralph Foster, had no role whatsoever in the prosecution of the case. (Id.)

After the arrest of Respondent and his co-indictees in West Virginia, they were extradited to Georgia. Rather than being held in Seminole County, they were held in the Randolph County Jail. The defendants were told by the sheriff there that they were being held there for their safety. (T. Nov. Hrng. at 157). When the four were brought to Seminole County for their first appearance, a large group of citizens gathered outside the courthouse. The transporting officers commented that they had to take the utmost precaution to secure the suspects' safety because of the crowd.[7] (T. Nov. Hrng. at 124, 126, 129). Security at the courthouse was extremely tight. Bill Montgomery, a journalist with over twenty years of experience, testified that he had never seen that level of security in a small county. (T. Aug. Hrng. at 58). Thelma Harrington, a lifetime resident of Seminole County, described the security as tight in order "to keep down violence." (T. Nov. Hrng. 191).

Prior to the trials of the co-indictees, Billy Isaacs, one of the co-indictees, agreed to testify for the State in exchange for a favorable plea bargain. At that point, he noted a distinct change in the community's attitude towards him. After he agreed to testify for the State, people in the community began to send him gifts such as paint sets, fruit, candy, etc. (T. Nov. Hrng. at 130-31).

The trials of the remaining co-indictees were held during three consecutive weeks in January, 1974. Carl Isaacs was tried first, beginning on January 1; George Dungee's trial began on January 7. It was not until after Isaacs and Dungee were convicted and sentenced to death that Respondent Coleman's trial began. All three trials were held in Seminole County.

The trials were conducted in a packed courtroom amid extremely tight security. The Alday family sat on the front row in full view of the jury.

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7. Sheriff White of Seminole County stated: "[t]here's no doubt in my mind that lynching has crossed the mind of everybody."

Mrs. Lillian Carter, the mother of then Governor Jimmy Carter, sat with the Alday family. (T. Nov. Hrg. at 522; T. Farrington Depos. at 11).

All the evidence, testimony, etc. from the Isaacs and Dungee trials were widely reported in Seminole County, including the testimony of Billy Isaacs during which he graphically described the murders. The Isaacs and Dungee verdicts of guilt and sentences of death were known to virtually everyone in the Seminole County community prior to Wayne Carl Coleman's trial; everyone was discussing them and the word spread like "chaff in the wind". Community sentiment was strongly in favor of the guilty verdicts and death sentences imposed. (T. Nov. Hrng. at 193-95; 491; 523-24). Furthermore, the fact that relatives of the victims were extremely pleased with the sentences of death imposed upon Isaacs and Dungee was also widely publicized prior to Respondent's trial. One article in the Atlanta Constitution, headlined "Alday Family Hoped for Death Penalty, Speak Their Feelings", concluded by noting that the wife of one of the Alday victims smiled broadly "after the death penalty was returned for Isaacs". Another noted that relatives of the victims appeared pleased and relieved when the death sentence was announced. All members of Respondent's petit jury knew that Isaacs and Dungee had been found guilty and sentenced to death.

One of the jurors who sat on Wayne Carl Coleman's trial jury was Joseph Bird. A summons for jury service intended for Joe E. Byrd was delivered to Joseph Bird. Although Mr. Bird informed the serving officer that he was not the person named on the summons, he was told to come to court anyway. (T. Nov. Hrng. at 5-7). Both prior to and during Wayne Carl Coleman's trial, Joseph Bird was dating Marilyn Alday, a relative of the victims in this case. He had been dating Ms. Alday since she was thirteen years old; they are now married. (T. Nov. Hrng. at 26, 34-35). Prior to trial, Joseph Bird and Marilyn Alday had talked about the case several times. (Id. at 27). At his voir dire examination, Joseph Bird acted as if he barely knew the Aldays and did not reveal that he was dating Marilyn Alday.

Other facts will be developed as they relate to Respondent's argument.

REASONS THE WRIT SHOULD NOT BE GRANTED

I.

THE WRIT SHOULD NOT BE GRANTED BECAUSE THE ELEVENTH CIRCUIT CORRECTLY DECIDED THAT UNDER THE REMARKABLE FACTS IN THIS CASE RESPONDENT WAS ENTITLED TO A NEW TRIAL DUE TO THE OVERWHELMING EVIDENCE IN THE RECORD THAT EXTENSIVE AND PREJUDICIAL PUBLICITY PREDISPOSED THE COMMUNITY TO BELIEVE NOT ONLY THAT RESPONDENT WAS GUILTY BUT MUCH MORE SIGNIFICANTLY THAT THE DEATH PENALTY WAS THE ONLY ACCEPTABLE PUNISHMENT.

A. The Court of Appeals' Opinion

The Court of Appeals' application of the presumed prejudice standard can only be fairly described as extremely cautious, recognizing that the burden placed upon a habeas corpus petitioner "to show that pretrial publicity deprived him of his right to a fair trial before an impartial jury is an extremely heavy one", Coleman v. Kemp, supra, 778 F.2d at 1537. The Court of Appeals went on to say:

> Indeed, this case is a close case only because of the extremely high standard that must be met. If there were no constitutional right to a change of venue in the instant case, then one can conceive of virtually no case in which a change of venue would be a constitutional necessity. 778 F.2d at 1538.

A review of the record makes plain that the Eleventh Circuit was not engaging in hyperbole when it made the above statement. The "totality of the circumstances"[8] surrounding Respondent's trial allow no other result.

The publicity regarding Respondent's trial saturated this small community. This publicity did not simply consist of neutrally detailing the facts of the crime (horrible in and of themselves) but rather characterized

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8. The panel emphasized that in examining the "totality of the circumstances", no single factor is dispositive. "Instead, we have weighed each element of the prejudicial publicity, taking into consideration the pervasiveness of the circulation thereof and how that publicity contributed to the totality of the circumstances." 778 F.2d at 1538.

the events and the defendant in a particularly hostile and negative manner[9] and raised other very prejudicial facts concerning Respondent never introduced at trial, e.g. that he had confessed to the murder of a Pennsylvania youth, that he was an escapee from a Maryland prison, were widely reported in the various media. Furthermore, in addition to these "facts", there were also statements from various members of the community, as well as editorials in several newspapers indicating not only that Respondent was guilty but also that the only appropriate sentence was death.[10]

As the Court of Appeals found: "[t]he clear picture that emerges from the publicity itself [is that] "the community was predisposed to both guilt and sentence . . ." 778 F.2d at 1539.

Furthermore, the Court of Appeals, in applying the presumed prejudice standard of Rideau v. Louisiana, 373 U.S. 723 (1963), was faithful to the presumption of correctness required by 28 U.S.C. 2254(d). The court, although specifically not deciding whether "presumed prejudice" was a mixed question of fact and law or a pure question of fact, did find that applying "any of the relevant legal standards, be it 'manifest error', 'fairly supported by the record', 'clearly erroneous', or independent review of a mixed question . . . under the extremely high Rideau standard . . . Coleman has met the standard." 778 F.2d at 1537-38.

The Court of Appeals recognized that the evidence of Respondent's, as well as his co-indictees', guilt was overwhelming. However, the panel also

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9. A brief review of the language used in the articles as well as descriptions of the defendants, will demonstrate Respondent's point.

10. The publicity concerning the appropriateness of the death penalty began ever. before Respondent was apprehended. The quite obvious point these editorials and articles were making was that whoever was guilty of the crimes should be executed. Counsel for the Petitioner conceded this point at oral argument in the Eleventh Circuit.

recognized that this was not dispositive because to "hold otherwise would mean an obviously guilty defendant would have no right to a fair trial before an impartial jury." 778 F.2d at 1541. The court also recognized the anamoly of considering the strength of the evidence as to the penalty phase of Respondent's trial, since the jury, pursuant to Georgia's death penalty statute, has the absolute discretion to recommend mercy. 778 F.2d at 1549.

Finally, the panel extensively discussed the voir dire record in this case. The court assumed that a voir dire record could rebut a finding of presumed prejudice. 778 F.2d at 1541. Then the panel reviewed the record in detail, finding that the voir dire did not rebut the presumption of prejudice because: (i) the jurors were examined in each others' presence; (ii) the questions asked were inadequate to discover prejudice; and, (iii) despite the first two problems, thirty-eight of seventy-seven members of Respondent's venire were still excused for cause for having a fixed opinion regarding the case.[11] 778 F.2d at 1542-43.

In sum, the Court of Appeals carefully reviewed the evidence and reached the only conclusion compatible with the constitutional requirements of a fair trial in a fair tribunal. Finally, Respondent would note that the panel granted relief reluctantly. In unusual language which Respondent's counsel have not found in prior decisions from the Eleventh Circuit (or any court), the panel stated:

> No one familiar with the facts of this case and the overwhelming evidence of guilt could fail to have sympathy for the prolonged suffering of the families of these victims. The fatal error of trying this case in Seminole County was not their decision. Similarly, the unwarranted delay in the final disposition of this matter is not their fault. 788 F.2d at 1543, n. 27.

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11. An interesting sideline to this is that one potential juror, whom the trial judge refused to excuse for cause, had known the victims for approximately nine years, attended the funerals, read newspaper accounts of the murders and the first two trials and testified as a witness for the State in the two previous trials of Respondent's co-indictees.

B. The overwhelming evidence of the extensive and inflammatory publicity surrounding Respondent's trial leaves no other conclusion than that if the Respondent is not entitled to relief then there is no federal habeas corpus remedy for the denial of a criminal defendant's motion for a change of venue.

It is axiomatic that a defendant, in a criminal prosecution, is entitled to a change of venue when it is shown that actual prejudice invaded the jury box, Irvin v. Dowd, 366 U.S. 717 (1963), or that the atmosphere in which the trial was conducted was inherently prejudicial, Rideau v. Louisiana, 373 U.S. 723 (1963); Sheppard v. Maxwell, 384 U.S. 333 (1966). If a defendant can demonstrate that the atmosphere in the community is inherently prejudicial, it is unnecessary to prove that actual prejudice invaded the jury box. The facts of Respondent's case, however, demonstrate both an inherently prejudicial atmosphere and that prejudice did indeed invade the jury box.

It is significant that this is a capital case. The Georgia capital sentencing scheme requires that the jury decide not only the guilt or innocence of the accused but also whether the penalty will be a sentence of death or life imprisonment. See generally, Gregg v. Georgia, 428 U.S. 153 (1976). Pursuant to this Court's precedent, the sentencing determination must be made based upon both the nature of the offense committed and any mitigating aspect of the offense or the background and character of the defendant. Lockett v. Ohio, 438 U.S. 586 (1978).

Long before Respondent Coleman's trial, the residents of Seminole County had determined that the only appropriate punishment for the person(s) convicted of the Alday murders was death.[12] Every witness who answered this question, both media representatives and Seminole County

12. One of the first articles in the Donalsonville News discussing the apprehension of the four suspects also carried an article on the same page (the front page) regarding the new death penalty listing the statutory aggravating circumstances. The cases were also widely reported as a "test" case for the new statute due to this Court' holding in Furman v. Georgia, 408 U.S. 238 (1972). Isaac's counsel was reported as saying that this was "exactly the kind of case" the legislature meant for the death penalty to be used in.

residents, testified that the community sentiment was unanimously in favor of the death penalty for anyone convicted of the Alday deaths. Local editorials made this point clearly.

The May 24 edition of the Donalsonville News carried an article which stated, in pertinent part,

> There is a wide difference in the question of whether the people here could give the suspects a fair trial, and in our wanting to see the guilty ones punished and removed. . . . .

The same edition carried another editorial which stated:

> There is just no place in society for the kind of individuals who place no value on the life of any other individual. . . .
>
> We kill rattlesnakes because they kill anything they come in contact with. We likewise shoot mad dogs or other rabid animals.
>
> When individuals become as low as these lower animals, they lose their right to human treatment.

Another editorial, from the May 17 edition of the Bainbridge Post Searchlight, entitled "Corner the Mad Dog" stated:

> In the editorial parlance of early American newspapers, it was not uncommon for the editor to suggest that the perpetrator of a heinous crime 'should be shot down like a dirty dog.'
>
> We never liked that particular phrase, because even the meanest dogs we have ever known would in no way compare with the guilty person or persons who committed the violent, outrageous, atrocious, vicious, and beastly murders of six members of the Alday family in Seminole County sometime last Monday night.
>
> To make such a comparison would be speaking disparagingly of dogs in general, and they are more entitled to consideration than the maniac or maniacs who snuffed out the lives of six human beings, five men and one woman during the course of the evening and in addition, criminally assaulted the woman before she was killed. At least, the record shows she was criminally assaulted either before or after death.
>
> Fellow citizens, this is not Chicago or Hell's Kitchen. This happened in South Georgia. Even the Mafia would refrain from the magnitude of such a crime.
>
> A sex maniac is running free in our area. A mad dog is on the "loose".
>
> We are staunch believers in law and order, and we believe those who commit capital felonies should be brought before the bar of justice, but this is one case where we hope the guilty will resist arrest, and will be felled where they are cornered.

> We must find this criminal or criminals if we have to track them to the four corners of the world. We must bring the ghoul or ghouls to bay and the guilty must be removed from our society just as a dog with rabies is removed. Permanently.

Another editorial from the same paper was entitled, "A Case for Capital Punishment". It stated:

> It is remarkable how anyone could be aware of the atrocities such as the Alday murders and still contend that capital punishment is too harsh, that is has no place in modern society, or that it is not an effective deterrent to criminals.

The May 31 edition of the Donalsonville News contained the following editorial, which stated in pertinent part:

> The brutal, senseless murders of six members of the Alday family should serve as another warning to all society that there is a need for capital punishment in this country. How can anyone who is aware of this heinous crime, still maintain that capital punishment is too harsh and should be stricken from our society for all time?
>
> The Alday case is a perfect case for capital punishment. It shows all too well our system of today with dealing with criminals is not working. Three of the persons charged with the execution style killings, escaped from a prison that was preparing them for life on the outside. They were to be released soon back into society. It seems clear that there are some criminals that just cannot be rehabilitated and should not be returned to society to destroy the lives of innocent, hard-working people like the Aldays.
>
> * * * * * *
>
> Those who oppose capital punishment argue that it is not a deterrent to brutal crimes. But it has been so long since we had an execution in Georgia that there is [sic] really no current statistics for an accurate evaluation. On the other hand, brutal crimes have climbed out of sight in the past several years and that ought to tell the "do-gooders" something about capital punishment.
>
> Look at it this way. When a person is convicted by the courts beyond a reasonable doubt of a crime like the slaughter of the Alday family, it seems to me there is nothing else society can do. It is absurd to accept the argument that such a criminal can be made to see the error of his ways. As long as such a criminal lives, he is indeed a threat to society. If he is put into prison, he has the opportunity for escape or parole. If he is executed, society has nothing more to fear from such a criminal.

As Thelma Harrington, a lifetime resident of Seminole County, who sat on co-indictee Dungee's jury said: everyone's opinion of the appropriate punishment was to "Fry 'em; electrocute 'em". The Clerk of Court of Seminole County, the most hostile witness to Respondent imaginable, testified that at least by the end of the Isaacs trial, he had determined that Wayne Carl Coleman should receive the death penalty. (T. Nov. Hrng. at 232). The Sheriff of Seminole County made the statement, widely reported in the media, that the death penalty was not enough punishment for Respondent and his co-indictees. According to then Sheriff White:

> If I had my way about it, I'd have me a large oven and I'd precook them for several days, just keep them alive and let them punish . . . . And I don't think that would satisfy me.
>
> I don't see where they could put up any plea for mercy . . . . The acts of these men are lower than animals.
>
> If a citizen gets out of hand and starts shooting people up, there's only one way to arrest and that's with a shotgun.
>
> Any man that believes in God believes in capital punishment . . . . I could throw the switch to the electric chair and never lose a minute's sleep.

Not one witness was presented at the evidentiary hearing to contradict the evidence that the community in which Respondent was convicted and sentenced to death had prejudged punishment in this case and had determined before his trial that death was the only acceptable punishment. Even Respondent's trial counsel underscored the community's sentiment. One of Wayne Coleman's appointed trial lawyers stated to the press: "this is the worst thing that's ever happened to me professionally. There is just no way I can get out of it. I pleaded with the judge. . . ." Other counsel were quoted as saying that "they planned to provide the best courtroom defense, but with reluctance." At the penalty phase of Coleman's trial, counsel told the jury at closing argument that the judge had appointed him against his

wishes.[13]

Respondent was further disadvantaged by the fact that he was tried third. Before his trial, the media had widely reported in Seminole County the details of the evidence presented at the Isaacs and Dungee trials and the verdicts and death sentences imposed at those trials. In fact, every juror in Coleman's case knew that his co-indictees had been convicted and had received the death penalty.

Seminole County was saturated by newspaper and magazine articles concerning this case. The newspaper articles concerning this case circulated in Seminole County accounted for 209 stories, consuming some 4,858 column inches. (T. Nov. Hrng. at 412). The testimony presented at the evidentiary hearing indicated that radio and television coverage was just as extensive. The transcript of the Georgia Network News broadcasts showed 33 days of broadcasts concerning this case which continued from the day of the commission of the offense until the completion of the trials. There is reason to believe that the coverage by the other electronic media was equally extensive. The Court of Appeals exhaustively discussed the articles, etc., regarding the Alday killings. A good deal of the material was factual. However, a significant percentage was not and either presented the defendants and/or the facts in an inflammatory manner or discussed prejudicial facts generally involving other crimes commited by Respondent and his co-indictees never introduced at Respondent's trial.

The extensive media publicity was only the springboard to more extensive word of mouth publicity concerning this case. As the testimony at the evidentiary hearing demonstrated, Seminole County is a small, tightly knit

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13. One attorney, J. Willis Conger, stated:

> I'd like very much to be relieved. I don't know of any lawyer in Georgia who would want the case. I don't know of anybody who wants it.
>
> I feel the feeling in Seminole County and this part of Georgia is such that I don't want it . It is not the kind of case I want to get involved in.

community in which word of mouth is virtually as important as the formal media in spreading prejudicial publicity concerning this case.

The effect of the publicity[14] is most easily demonstrated by reviewing Respondent's venire and petit jury. Approximately fifty percent (50%) or 38 out of 77 venirepersons drawn for Coleman's trial were dismissed for having fixed opinions as to the guilt of the accused. Given the sentiment of the community, there is every reason to believe that there was an attempt on the part of prospective jurors to attempt to be placed on the jury so that they could avenge the members of the Alday family. As strong as this may sound, an example will demonstrate Respondent's point. Mrs. Robert Hines, a prospective juror, denied having a fixed opinion. Mrs. Hines testified on voir dire that she had known the victims for 8 or 9 years, attended the funeral, read the newspapers, heard the news and testified as a witness for the State in the two previous trials of Respondent's co-indictees. She stated, however, that she had not been influenced by what she had heard and that she could give the defendant a fair trial. (Trial Tr. Vol. V, p. 478-479). The Respondent's challenge to this juror for cause was overruled. (Trial Tr. Vol. VI, p. 482).

The twelve jurors' level of awareness and concern about the killings was indicative of the effect the extensive publicity surrounding Respondent's trial. Justice Hill, in his dissent from the majority opinion affirming Respondent's convictions and sentences on direct appeal to the Georgia Supreme Court, recognized the disposition of the jurors when he stated:

> On voir dire, the twelve jurors who served testified as follows:
> Juror No. 1 testified that he knew the victims when he saw them. Although he did not go to the funeral, two days after their deaths he went by the trailer to pay his respects. He knew the two other cases were tried and their outcome and had discussed

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14. To underscore the point, it is Respondent's position that the effect of the inflammatory and extensive publicity was enhanced in this case by the prominence of the victims and the inherent nature of a small rural isolated locality such as Seminole County. If this were not enough in and of itself, the additional fact that the victim retained a special prosecutor, a former lieutenant governor of Georgia, who was very popular in Southwest Georgia, as well as the nephew of the trial judge, gave Respondent no chance at a fair trial.

those trials. He had read a lot about the cases in the newspapers and had seen and heard about the homicides on television and radio. The things he had heard did not make him think the defendant was probably guilty.

Juror No. 2 (later selected as foreman) testified that he had known the victims for eight years and had worked with two of them. They had never visited in his home nor he in theirs and he did not attend the funeral. He knew that two other defendants had been tried and both were found guilty but he had not discussed it with anyone. He had read newspaper articles and heard on television and radio about the crimes. Although the news he had read and heard pointed to defendant's guilt, the reports did not sway him one way or the other.

Juror No. 3 did not know the Aldays. He did know of the prior trials and convictions and he knew that this defendant was the fourth man. Although he had read about he case in the newspaper, he had seen it on television only once or twice. Although the publicity indicated that the defendant was guilty, he felt he could be impartial.

Juror No. 4 lived five or six miles from the trailer and knew all the Aldays but did not attend the funeral. He had read and heard some news accounts and knew that two other cases had been tried and verdicts of guilty returned.

Juror No. 5 did not know the victims. He had read news reports and knew about the trials but was not swayed by them.

Juror No. 6 had met one of the victims five or six years earlier in connection with an insurance claim. He had read and heard news of the homicides and of the trials.

Juror No. 7 knew all of the Aldays except Mary and went to the funeral. He had seen newspaper and television accounts of the crimes and trials.

Jury No. 8 knew all of the Aldays that were killed except Mary but did not know them well enough to visit them and did not attend their funeral. She had read newspapers and knew the outcomes of the other trials.

Juror No. 9 did not know the Aldays. She kept up with the cases on television and by newspaper and had discussed the matter with a friend. She knew the outcome of the earlier trials.

Juror No. 10 knew the victims by sight and had seen newspaper and television accounts of the other trials. She also had read a magazine article about the matter. The information she had read was unfavorable to the defendant but she felt she could be impartial.

> Juror No. 11 did not know the victims personally. She has read in the paper about the cases and prior convictions. The information she had read was unfavorable to the defendant and she believed to some extent the things she had read but felt she could be impartial.
>
> Juror No. 12 knew the victims when he saw them but did not know them personally. He had read news reports of the homicides and knew there were two prior convictions. He had not discussed the case.
>
> In summary, four of the empaneled jurors thought that the publicity indicated that the defendant was guilty but felt that they could be impartial. Another juror attended the Alday funeral and another went to the trailer to pay his respects. A majority of the jurors knew one or more of the victims. All twelve were aware of the outcome of the two earlier trials of co-defendants. [where both co-defendants were convicted and sentenced to death] Coleman v. State, 237 Ga. 84, 96-100, 226 S.E.2d 911 (1976).

As this Court stated in Irwin v. Dowd, supra: "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion." 366 U.S. at 728. Furthermore, to have Respondent's sentence decided in an atmosphere in which it had already been decided that the only appropriate acceptable punishment was death would contravene the Eighth Amendment's requirement that any sentence of death must be individualized. See Gregg v. Georgia, supra. In sum, a sentence imposed under such circumstances would be tantamount to a mandatory death penalty and therefore violate this Court's holding in Woodson v. North Carolina, 428 U.S. 280 (1976). Considering the small size of Seminole County, the overwhelming level of prejudicial publicity, the status of the Alday family in the community and the prejudice invading the jury box itself, if the Respondent is not entitled to habeas corpus relief due to the denial of his motion for a change of venue, then it can be safely said that there is no recourse in the federal courts for such violations occurring in state criminal proceedings. As the Court of Appeals recognized,

it is hard to conceive of a stronger case.

Finally, the Respondent takes issue with the Attorney General's contention that the Court of Appeals did not give proper deference to state court findings of fact as required by 28 U.S.C. 2254(d). First, this Court has never held that the presumption of correctness applies to a state court findings regarding presumed prejudice. It would seem at the very least to be a mixed question of law and fact.[15] Cf. Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844 (1985). The Attorney General's brief in the Eleventh Circuit conceded that the issue was a mixed question of law and fact. See State's Supplemental Brief at 17. However, the court below did not expressly resolve the issue because it determined that even assuming that presumed prejudice was a question of fact, the state court findings were not entitled to the presumption. 778 F.2d at 1537. The panel reached this conclusion for two reasons. First, it did not believe that material facts as found by the state courts were adequately developed at the state court hearing. 778 F.2d at 1537, n.18. Second, the facts as found were not fairly supported by the record. 778 F.2d at 1537. Either one of these reasons is a legitimate reason pursuant to 2254(d), for a federal court not to defer to state court findings of fact. 28 U.S.C. 2254(a)(3) & (8); see also Sumner v. Matta, 455 U.S. 591 (1982) (Sumner (II).

In Sumner this Court stated:

> Of course, the federal courts are not necessarily bound by the state court's findings. Section 2254(d) permits a federal court to conclude, for example, that a state finding was 'not fairly supported by the record.' But the statute does require the federal courts to face up to any disagreement as to the facts and to defer to the state court unless one of the factors is found. 455 U.S. at 597-98.

The Court of Appeals "faced up" to its task with all, and possibly more, deference than is statutorily required in Respondent's case. The remarkable thing is that Respondent's case has proceeded so far through our system of justice before some tribunal did.

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15. The Eleventh Circuit has previously treated it as a mixed question of law and fact. See, e.g. United States v. Capo, 596 F.2d 1086, 1090 (5th Cir. 1979), cert. denied, 444 U.S. 1019 (1980).

CONCLUSION

The Respondent, Wayne Carl Coleman, submits that for all the reasons stated above, the Eleventh Circuit correctly decided that he was entitled to a new trial and sentencing hearing in conformity with the requirements of the Eighth and Fourteenth Amendments. Therefore, Respondent requests that certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage annexed thereto addressed to Ms. Susan Boleyn, Assistant Attorney General, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 5th day of May, 1986.

Millard Farmer

85-1652

FILING STATEMENT

I hereby certify that on May 7, 1986, within the time period permitted by the Supreme Court Rules I personally deposited this Brief in Opposition to Petition For a Writ of Certiorari in the United States Mail with correct First Class Postage prepaid in conformity with Supreme Court Rule 28.2.

This 7th day of May, 1986.

James C. Bonner, Jr.
James C. Bonner, Jr.

NOTARY PUBLIC

EDITOR'S NOTE

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NO. 85-1652

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

RALPH KEMP, WARDEN,

Petitioner,

v.

WAYNE CARL COLEMAN,
CARL J. ISAACS AND
GEORGE ELDER DUNGEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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NO. 85-1652

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

RALPH KEMP, WARDEN

Petitioner

v.

WAYNE CARL COLEMAN,
CARL J. ISAACS AND
GEORGE ELDER DUNGEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Statement of the case in the Petition for a Writ of Certiorari is incorporated by reference.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE RULE OF RIDEAU V. LOUISIANA, 373 U.S. 726 (1963) IS NOT IN CONFLICT WITH 28 U.S.C. 2254(d) OR RECENT DECISIONS OF THIS COURT, AND IS NECESSARY IN THE RARE CASES IN WHICH IT IS APPLIED

The rule of Rideau v. Louisiana, 373 U.S. 726 (1963) is that in extreme cases, a reviewing court may find that a change of venue is mandated by due process without first examining a transcript of the jury selection. As noted in the Court below, this method of analysis has rarely resulted in the reversal of convictions. Coleman v. Kemp, 778 F2d 1487, 1490, (11th Cir. 1985).

The Rideau rule is necessary because it provides a workable method of analysis in the unique circumstances in which it has been employed. In Rideau, the televised confession of the defendant was viewed by three trial jurors. Despite their exposure to this clearly prejudicial telecast the jurors in question were seated, having been found by the trial court to be sufficiently impartial. The Rideau majority recognized that because this was a unique and extreme situation the voir dire transcript did not reflect the prejudice which resided in the community.

In urging the continued vitality of the Rideau principle it is not necessary to suggest that the jurors in Rideau or in the cases sub judice lied when they stated they could be impartial. In rare cases the legal system requires too much of a juror when that juror is asked to ignore prejudicial publicity which has inundated his community and aroused the passion of himself and his neighbors. "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often it father." Irvin v. Dowd, 366 U.S. 717, 728 (1961).

The Petitioner has charged that the circuit court ignored the "presumption of correctness" mandated by 28 U.S.C. 2254(d). Critical exhibits and testimony were available for the first time in the Federal District Court and were not considered by the State fact-finders. Coleman v. Zant, 708 F2d 541, 545-548 (11th Cir. 1983).

The Court below did consider the "fairly supported by the record" standard of 28 U.S.C. 2254(d). In fact that court evaluated the "manifest error" standard of Irvin, the "extemely high" Rideau standard, and the "fairly supported by the record" standard of 28 U.S.C. 2254(d) and found that all of them were satisfied. Coleman v. Kemp 778 F2d at 1537-1538. The Court went on to note "If there were no consitutional right to a change of venue in the instant case, then one can conceive of virtually no case in which a change of venue would be a constitutional necessity." Coleman v. Kemp 778 F2d at 1538. If the standards mentioned above are in need of clarification then this Court ought to do so in a case where the fine distinctions drawn might change the outcome. The Petitioner asserts that the Court below afforded no consideration to the voir dire proceedings. This is simply not so. Coleman v. Zant 778 F2d at 1541-1543. In the cases sub judice the potential jurors were examined in the presence of each other, educating each juror as to the questions he or she would be asked. This problem was compounded by the requirement that counsel had to elect at the conclusion of the questioning of each juror and announce their decision. Potential jurors thus knew the questions they would be asked and the answers which would likely gain them a seat in the jury box or in the spectators' gallery, whichever they preferred.

In addition, the actual questions asked were conclusory in nature. Rather than asking of jurors exploratory questions about the extent of their exposure and its effect on their view of the case, jurors were asked if they were exposed, and then if so, could

they still be fair. This shallow examination was not one that could be relied upon to refect the exact nature of exposure and the sentiment generated as a result of that exposure.

In the recent case of Patton v. Yount, ___ U.S. ___, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) this Court dealt with the concept of special deference due state court findings of impartiality. In Patton v. Yount the circuit court below had made a specific determination that Rideau was not applicable. Yount v. Patton, 710 F2d 956, 968 (3rd Cir. 1983).

Of equal significance is the difference between the voir dire in Patton v. Yount and that conducted in this case. In Patton v. Yount it took 10 days to seat 14 jurors from a total of 147. In the cases sub judice 3 juries were selected in far less time from a similar total. The jurors in Patton v. Yount were brought into the court room individually for questioning. While this distinction is not controlling, it is not insubstantial. Patton v. Yount, 467 U.S. at _____ n. 10, 104 S.Ct. at 2890 n. 10. Because of the procedural safeguards and the depth of the questioning in Patton v. Yount the state court had a voir dire which was entitled to special deference. That simply is not so in these cases.

The unique and exteme circumstances in the case illustrate the necessity of the Rideau rule. 28 U.S.C. 2254(d) ought never be construed in such a way as to foreclose a Rideau inquiry. The court below did not ignore the standard of 28 U.S.C. 2254(d), it simply held that that high standard had been exceeded in this case. There is no inconsistency between Rideau and the amended Federal habeas corpus statute. The latter can be construed as setting forth a standard for the application of the former.

It cannot be said that Patton v. Yount, which did not purport to construe Rideau mandates that Rideau, should be overruled. The factual difference between Patton v. Yount and the case sub judice illustrate the continuing need for a Rideau inquiry in rare, unique and extreme cases.

The Rideau rule poses no threat to our system of criminal justice because of its rare application. This is so in spite of the increasing number of pretrial publicity cases. Because Rideau can exist in harmony with 28 U.S.C. 2254 and Patton v. Yount, and not significantly impact the criminal justice system, this Court should decline to issue its Writ of Certiorari in this case.

II. BECAUSE THE "TOTALITY OF THE CIRCUMSTANCES" CAN VARY DRAMATICALLY FROM CASE TO CASE AND BECAUSE THE CIRCUIT COURT EXHAUSTIVELY AND ACCURATELY EXAMINED ALL OF THE RELEVANT CIRCUMSTANCES OF THIS CASE, THIS COURT SHOULD DENY CERTIORARI.

If one notion can be gleaned from reading the body of "pretrial publicity-venue change" cases it is that what they have in common is their uniqueness. The differences between Rideau v. Louisiana, Shepherd v. Maxwell, 384 U.S. 333 (1966), Murphy v. Florida, 421 U.S. 794 (1975) and this case are so obvious that they need no explication here. Suffice it to say that as soon as this Court sets forth a supposed all encomposing list of factors to be applied in pretrial publicity cases, new cases will arise which do not fit within the previously announced guidelines, but present new circumstances. This is an area of the law which by its very nature ought to be shaped by a case by case analysis which is best done by lower courts. In so doing, courts can assess what factors are present or absent in a particular case, and the extent to which they are relevant bases on the underlying facts of that case.

That is precisely the type of analysis performed by the circuit court below. To suggest, as the Petitioner has, that the circuit court relied solely on an analysis of the "sources and volume of pretrial publicity" (Petition For a Writ of Certiorari p. 18) is to ignore significant portions of their opinion.

The circuit court carefully and completely analyzed the publicity form all of the critical sources, after noting their circulation. This analysis takes the form of a day by day breakdown of each newspaper's coverage, noting the headline, the content, the date of publication, and the location of the article within the newspaper. Where appropriate, the Court noted the very few articles which could be construed as being "favorable" to the Petitioners, and quoted extensively from one. Coleman v. Kemp 778 F2d at 1492. The Court expressed particular concern about articles which contained prejudicial information which could not be admitted at trial. Coleman v. Kemp 778 F2d at 1538.

In addition, the same type of analysis was done on the only avaliable radio broadcast transcripts. The broadcasts were identifed by date, and those which contained no prejudicial infomation were noted.

The court then went on to discuss word of mouth communication. The Petitioner criticizes the use of the "small town syndrome" (Petition For a Writ of Certiorari p. 20) but the powerful role of word of mouth communication in this small town was established by several witnesses. Coleman v. Kemp 778 F2d at 1533-6. Seminole County in 1973 may or may not have been a part of the technological "global community," but the role of word of mouth communication in that community was large, it was clearly illustrated in the record, and the circuit court would have been irresponsible to ignore it, which it did not.

The Court also considered the testimony of journalists who covered the story and who were present in Seminole County during the critical periods, but again, where approriate, the Court noted those whose testimony was favorable to the state. Coleman v. Kemp 778 F2d at 1536.

Having analyzed the volume, content and timing of the publicity, the role of word-of-mouth communication, and the

testimony as to community atmosphere, the Court summarized the other factors upon which it relied. Coleman v. Kemp 778 F2d at 1538-40. It discussed the tiny community's friendship for the victims, inflamatory remarks by the Sheriff and the defendants mother, the statements of attorneys seeking to avoid their appointments in this case, and the hiring of a special prosecutor to secure the death penalty.

The Petitioner has compiled a list of factors (Petition For a Writ of Certiorari p. 19) which he argues were "not properly taken into consideration." But as noted above, the circuit court did discuss the volume, content and timing of each article or available broadcast. It noted appeals for a fair trial by members of the community. Coleman v. Kemp 778 F2d at 1539 n.20. It indicated the sources of the quotes in the stories article by article. The very few containing mitigating factors were even highlighted. The court took into account the timing and content of the stories dealing with Billy Isaacs' testimony. It discussed the rumors of mob violence, and the court specifically discounted one source of that information. Coleman v. Kemp 778 F2d at 1535 n.15. It carefully pointed out the source of every article and noted the circulation of each, including the Atlanta newspapers, Coleman v. Kemp 778 F2d at 1517.

Because of the unique nature of "pretrial publicity" cases, they are best resolved on a case by case basis. All of the relevant circumstances of this case were considered by the circuit court in reaching their decision. The circumstances of this case are so extreme and rare that further explication by this Court would consume its resources while providing very little guidance for future cases.

CONCLUSION

The teaching of Rideau remains vital and necessary in the few cases where it is applied. The decision of the circuit court is an exhaustive study of the relevant factors in this case and illustates the propriety of case by case analysis. Accordingly, this Court should deny the writ of certiorari.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Respondent Carl J. Isaacs was served upon counsel of record for Petitioner, Susan V. Boleyn, Assistant Attorney General, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA, 30334, by mailing a copy of each to her, at the foregoing address, by first class United States Mail, this 7th day of May, 1986.

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